Supreme Court, U. S.
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In the

Supreme Court of the United States

October Term, 1977

No. 77-1782

ARTHUR ANDERSEN & CO.,
Petitioner,

v.

STATE OF OHIO, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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77-1743

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Arthur Andersen & Co. ("Andersen"), Defendant-Appellant below, petitions for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review a judgment of that court entered February 9, 1978 in an appeal from the United States District Court for the District of Colorado.

OPINION BELOW

The Court of Appeals' opinion is reported at 570 F.2d 1370 (10th Cir. 1978).

JURISDICTION

The judgment and opinion of the Court of Appeals sought to be reviewed were entered on February 9, 1978. On March 22, 1978 the Court of Appeals entered an order denying Andersen's petition for rehearing and suggestion for rehearing in banc. The jurisdiction of this Court to review the instant case is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a defendant ordered to produce documents from its office in a foreign country in violation of the criminal and civil laws of such foreign country, unless and until the consents of certain affected persons were first obtained, has been denied due process of law or unlawfully punished by the entry of a prejudicial preclusionary order and fine for its delay in producing such documents until the required consents were obtained where all of the documents ordered produced had been produced long prior to the hearing on sanctions and no trial date has yet been set.

2. Whether it is consistent with the Due Process Clause of the Fifth Amendment and Rules 34 and 37, F.R. Civ. P., for a federal district court, in the circumstances of this case, to impose sanctions under Rule 37 precluding a defendant from fully contesting a plaintiff's claims at trial, not for the purpose of compelling discovery, which had been fully made, or to redress prejudice, which did not exist, but solely to punish the defendant and to set an example for others.

STATUTES INVOLVED

The statutes involved, which are set forth in Appendix A, pp. 16-24, are:

Penal Code of Switzerland:

Article 35 (Recueil Systematique du Droit Federal, Book 1, p. 9)

Article 36 (R.S.D.F., Book 1, p. 9)

Article 48 (R.S.D.F., Book 1, pp. 19-20)

Article 162 (R.S.D.F., Book 2, p. 57)

Article 273 (R.S.D.F., Book 2, pp. 89-90)

Rules:

Rule 34, Federal Rules of Civil Procedure (U.S. Code, Vol. 7, p. 7793)

Rule 37, Federal Rules of Civil Procedure (U.S. Code, Vol. 7, pp. 7798-99)

STATEMENT

Andersen is a partnership of independent public accountants that has offices and conducts its professional practice throughout the United States and in numerous foreign countries. It is thus, like many other concerns, subject to the laws of the United States and the foreign countries in which it conducts its professional practice.

In the spring of 1970 the State of Ohio made two loans aggregating $8,000,000 to King Resources Company, an audit client of Andersen's Denver, Colorado office. In August, 1971 King Resources Company went into Chapter X reorganization proceedings. In April, 1972 Ohio filed suit against King Resources Company, Arthur Andersen & Co., and others seeking to recover the loans.

Prior to the cut-off of discovery as of April 3, 1976 Andersen had produced to Ohio approximately 55,000 documents which had been microfilmed by Ohio.

On May 27, 1976, on an application by plaintiff filed after the cut-off of discovery, the district court for the first time ordered Andersen to provide certain documents from its office located in Geneva, Switzerland. A subsequent related order set a final deadline of August 20, 1976 for full compliance.

On June 18, 1976, Andersen's Denver counsel commenced a file search in Geneva, Switzerland for the documents ordered produced. Two hundred twenty responsive documents were located. The responsive documents were reviewed with Swiss counsel, who determined whether, under Swiss criminal and civil law, they could be provided promptly or whether both the criminal and civil laws of Switzerland prohibited their production unless and until the consents of various non-parties were first ob-

tained because they contained the protected business secrets of such non-parties.

Appeals and mandamus were sought in respect of that order and certain related orders of the district court and a stay of such orders was obtained on July 23, 1976 from the Tenth Circuit because Andersen had been unable to obtain all of the requisite consents to disclosures from non-parties to the action, which stay remained in effect until January 10, 1977.

By July 29, 1976, Andersen had produced all, or the responsive portions, of 195 of the 220 documents ordered produced and had filed a list describing each of the 25 documents not yet produced and identifying the non-party consents Swiss counsel advised were required by both the Swiss criminal and civil law before the remaining documents could be produced.

As Andersen obtained the required consents of such non-parties, or was able to find copies outside of Switzerland of documents identified by its search of the Geneva files, it produced the documents. By January 21, 1977, five months after the district court's deadline for discovery, but only eleven days after the expiration of the stay, Andersen had produced all of the documents in respect of which the severe sanctions were imposed four months later without any prejudice to plaintiff having been established.

On May 23, 1977, the district court severely sanctioned Andersen for its delayed compliance. The court entered an order that at trial Andersen "shall not oppose or introduce any evidence opposing [two of] plaintiff State of Ohio's [principal] claims" and awarded plaintiff $59,949. *State of Ohio v. Crofters, Inc.*, 75 F.R.D. 12, 25-26 (D. Colo. 1977). The Tenth Circuit affirmed.

Andersen did decline to provide each document ordered to be produced until it had obtained the required consents or located copies thereof outside of Switzerland.

As a consequence the ordered discovery was delayed beyond deadlines imposed by the district court, but full compliance was delayed only eleven days after the expiration of the stay. Andersen has been severely sanctioned for the delay caused by the necessity to obtain the required consents in order to avoid violating both the criminal and civil laws of Switzerland. As of the date of the filing of this petition, Ohio has had all the documents in question for 17 months and has used them during depositions of Andersen personnel; and the court has not as yet considered setting a trial date.

REASONS FOR GRANTING THE WRIT

I

This petition presents for review the question whether it was a denial of due process or a violation of federal law to impose a preclusionary order and fine against a defendant who has made full discovery, but whose delay in compliance with the ordered discovery was caused by the requirements of the criminal and civil laws of Switzerland that prior to production the defendant obtain consents of non-parties whose protected business secrets were included in the documents ordered produced. All the documents in question were produced as and when the defendant, at a total cost of over $71,000, obtained the required consents or was able to locate copies of the documents outside of Switzerland. No prejudice to plaintiff as a result of the delay was established.

The conflict between domestic discovery orders and foreign legal prohibitions to be resolved is one potentially confronting every American firm which does business abroad. The conduct of business on a world-wide basis is now commonplace. Each company engaged in such business is required to comply with the laws of each country in which it conducts its business. This case presents an

important due process and federal law question which is likely to recur with increasing frequency and which should be addressed by this Court.

It is respectfully submitted that the district court's imposition of the preclusionary sanction and fine against the defendant in these circumstances was contrary to the Due Process Clause, contrary to this Court's decision in *Societe Internationale v. Rogers,* 357 U.S. 197 (1958), and contrary to applicable decisions of the Second Circuit: *Trade Development Bank v. Continental Insurance Co.,* 469 F.2d 35 (2d Cir. 1972); *United States v. First National City Bank,* 369 F.2d 897 (2d Cir. 1968); *Application of Chase Manhattan Bank,* 297 F.2d 611 (2d Cir. 1962); *Ings v. Ferguson,* 282 F.2d 149 (2d Cir. 1960); *First National City Bank v. Internal Revenue Service,* 271 F.2d 616 (2d Cir. 1959), *cert. denied,* 361 U.S. 948 (1960).

In *Societe* a Swiss company—a plaintiff, which had voluntarily sought the aid of a United States district court —had produced from Switzerland, after obtaining consents or otherwise meeting the prohibitions of Swiss law, substantial quantities of documents ordered produced by the district court. However, the plaintiff had declined to produce from Switzerland thousands of documents ordered produced because of its inability to comply with Swiss law as to them. Even though the plaintiff had first been ordered to produce these documents nine years before this Court's decision, this Court held that, in light of the Due Process Clause, dismissal of plaintiff's case was inappropriate and indicated that the most severe punishment appropriate for the *non*-production *might* be the "[possible] drawing [of] inferences [at trial] unfavorable to petitioner as to particular events" if production had not then been made. *Societe,* 357 U.S. at 213.

> "It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for non-production, and this excuse is not weakened because the laws preventing compliance are those of a foreign country." *Id.* at 211.

This is an *a fortiori* precedent for a defendant who has been involuntarily brought before a court by legal process.

Andersen, the defendant in the instant case, sought to excuse only delay — not non-production — because of fear of criminal prosecution that could be directed at its personnel in Switzerland, civil litigation, and potential loss of its license to do bank and mutual funding auditing if the ordered discovery were provided from Switzerland without first obtaining the necessary consents.

Reduced to fundamental principles, *Societe* and the cited decisions of the Second Circuit establish that the Due Process Clause and federal law require that a conflict between an order directing discovery from a foreign country and a discovered party's (even a plaintiff and most certainly a defendant) inability to respond because of the prohibitions of foreign law should be reconciled by affording the discovered party every reasonable opportunity to comply right up to the time of trial so long as the discovered party persists in its efforts to provide the discovery ordered. This basic due process requirement was disregarded in this case — the district court issued orders directing immediate production without regard to whether such production would violate Swiss law, and then severely sanctioned Andersen for non-compliance with the deadline imposed.

> "Now I want it clearly understood that the 19th of August is the cutoff date. The cutoff date is tonight for documents that you can get by tonight, *but in any event, with or without consents, the Court wants full compliance by the 20th of August on these 20 or 25 documents . . .*" (Emphasis added.)

Andersen's efforts to obtain the district court's assistance in establishing procedures satisfactory to the district court and parties which would permit Andersen to provide the ordered discovery in a manner compatible with Swiss law were rejected. Andersen then proceeded in the same manner as the petitioner in *Societe* — withholding production while seeking consents or alternative means to satisfy to the extent possible the requirements of Swiss law, and producing the documents as and when the requirements of Swiss law were met or obviated at great expense to Andersen.

The district court viewed defendant Andersen's good faith efforts to reconcile the conflict between its order and Swiss law as a charade, obstruction and avoidance. The Tenth Circuit adopted the district court's erroneous findings of fact and conclusions of law and affirmed.

It is respectfully submitted that a party's failure to make production from a foreign country until it has complied with the applicable criminal and civil laws of that country is not a charade, obstruction and avoidance, bad faith or sanctionable conduct but is appropriate under the Due Process Clause, the decision of this Court in *Societe*, the cited Second Circuit decisions, and the realities of today's world where companies are increasingly subject to the laws of more than one sovereign.

It is further submitted that the Due Process Clause and federal law as interpreted in *Societe* and the Second Circuit cases require the Federal Rules of Civil Procedure to be applied in a manner which permits the discovered party to comply with discovery orders in a manner compatible with foreign law, and that the conflicting decision of the district court affirmed by the Tenth Circuit should be reversed and brought into line with those decisions. Rule 19(1)(a) and (b) of the Supreme Court Rules.

Consideration of the important question presented should not be denied because of errors of fundamental facts

by the district court, adopted by the Tenth Circuit, which form the basis for their erroneous conclusions that Andersen did not proceed as outlined in Andersen's Statement at pp. 3-5. Contrary to the basic facts found by the district court, and adopted by the Tenth Circuit, the record establishes unequivocally that:

(i) Andersen was not ordered to provide discovery from Switzerland until May 27, 1976 and thus did not delay from November 1975 to May 27, 1976 making the production ordered. (Compare Appendix B, pp. 25-29, with Tenth Circuit opinion, 570 F.2d at 1373, 1374).

(ii) Andersen did not improperly delay the review by counsel of its files in Geneva, Switzerland, but rather undertook that review promptly after it became incumbent upon it to do so. (Compare Appendix C, pp. 30-39, with Tenth Circuit opinion, 570 F.2d at 1374).

(iii) Andersen adhered throughout to its position of not providing the ordered discovery until the Swiss law prohibitions had been met and at no time abandoned this position. (Compare Appendix D, pp. 40-51, with Tenth Circuit opinion, 570 F.2d at 1374).

(iv) Andersen did not obtain the consent of I.O.S., Ltd. until December 1976 and thus did not delay from May 1976 to December 1976 producing the documents covered by that consent. (Compare Appendix E, pp. 52-62, with Tenth Circuit opinion, 570 F.2d at 1373).

(v) Andersen's production from sources other than Geneva of copies of certain of the documents not identified until the search of its files in Geneva was a good-faith effort to obviate Swiss law prohibitions and to make production more quickly than would otherwise have been possible because under Swiss law no consents were required to produce copies located outside Switzerland. (Compare Appendix F, p. 63, with Tenth Circuit opinion, 570 F.2d at 1373, 1374).

To deny reveiw because of erroneous basic conclusions would emasculate *Societe* and would enable lower courts to evade review where the principles of *Societe* have been violated by arriving at unsupported conclusions. See *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 641, 643 (1975), where this Court granted certiorari and reversed the Third Circuit, which the Supreme Court found had arrived at erroneous conclusions contrary to those of the district court.

II

This case presents for review a second important due process and federal law question: whether under Rule 37, F.R. Civ. P. a preclusionary order may properly be entered against a defendant, in the circumstances of this case, directing the defendant "not to oppose or introduce any evidence opposing [two of] plaintiff State of Ohio's [principal] claims", not for the purposes of compelling discovery (which had been fully made) or to redress prejudice (which was not established), but solely to punish the defendant and to set an example for others.

Rule 37, F.R. Civ. P. — "Failure To Make Discovery: Sanctions" — provides a means by which the trial court can insure that the purposes served by the pre-trial discovery process are fulfilled. Thus, Rule 37 sanctions may be imposed when necessary to compel a party to furnish discovery or to prevent prejudice to one party which otherwise would result from its adversary's abuse of the discovery process. See, *e.g., Dorsey v. Academy Moving & Storage, Inc.,* 423 F.2d 858, 860 (5th Cir. 1970); *Robison v. Transamerica Ins. Co.,* 368 F.2d 37, 39 (10th Cir. 1966); "The Emerging Deterrence Orientation In The Imposition Of Discovery Sanctions," 91 Harvard L. Rev. 1032, 1038-1040 (1978) ("*The Deterrence Orientation*").

Compatible with these principles, a trial court's selection of the particular Rule 37 sanction to be imposed in a particular case should be guided by a consideration of the nature of the discovery abuse involved and the framing of a remedy which rationally relates to curing that abuse. See, *e.g.,* "An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed For The Purpose Of Insuring Compliance With Pre-Trial Orders," Hon. Sterry R. Waterman, 29 F.R.D. 420, 426 (1961) ("the appellate court should only insist that the 'punishment fit the crime.'"). Thus, courts have held that it is proper to impose the preclusion sanction authorized by Rule 37(b)(2)(B) — "an order refusing to allow the disobedient party to support or oppose designated claims or defenses . . ." — when the "disobedient party" has refused to provide discovery respecting such "designated claim or defense." The rationale is clear, and sensible: that a party's failure or refusal to produce such information as to a claim, when it is within his power to produce such information, constitutes a logical and fair basis for "presuming" that the party's position respecting that claim lacks merit. Under such circumstances, the sanction also addresses the prejudice theoretically caused to the discovering party which has been deprived of the full evidence respecting the claim. *Societe, supra,* 357 U.S. at 212-213; *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 350-351 (1909); *Norman v. Young,* 422 F.2d 470, 473 (10th Cir. 1970); "Standards For Imposition Of Discovery Sanctions," 27 Maine L. Rev. 247, 251 (1975).

The district court's imposition of a preclusion sanction upon defendant Andersen was in clear conflict with these principles. Several months prior to the imposition of the preclusion sanctions Andersen had provided *all* the discovery which formed the purported basis for the sanction imposed. Thus there was and could be no logical basis for the drawing of a presumption adverse to Andersen based on the absence

of information because all the information had been made available. Furthermore, the discovery was furnished in time for the discovering party to use it during depositions and the discovery is available for any appropriate use at trial (no trial date yet has been considered by the court). Thus, there is no substantive "prejudice" to the discovering party which the "preclusion" sanction rationally could redress.

In these circumstances the district court's imposition of the preclusion sanction — an order which bears no rational relationship to the effectuation of the discovery process or to the remedying of any harm suffered by the discovering party — can only serve a punitive function. That sanctions, purportedly imposed under Rule 37, may not be imposed purely "for punishment's sake" is the explicit teaching of decisions of this Court and other courts which have emphasized the constitutional constraints upon a trial court's exercise of its powers under Rule 37. See, *e.g.*, *Societe, supra,* 357 U.S. at 109 ("the provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law . . . "). The "preclusion sanction" has been referred to as tantamount to a "partial . . . summary or default judgment", *SEC v. Los Angeles Trust D. & M. Exch.*, 24 F.R.D. 460, 466-467 (S.D. Calif. 1959). It follows that the exercise of the power to preclude under Rule 37 for the purpose of punishing a defendant or to deter others violates due process and federal law.

In its judgment, the Court of Appeals for the Tenth Circuit disregarded these concerns. It stated as follows:

> "In opposing the sanctions, Andersen emphasizes that it finally produced the documents. Final production is not determinative. The Rule permits a sanction when a party 'fails to obey an order.' Andersen refused willfully to obey for an unreasonable time on the contrived excuse, eventually abandoned,[*] of the Swiss secrecy laws. The ultimate, and reluctant, production of documents, more than a year[*] after a legitimate request, does not absolve Andersen of the charge that it willfully failed to obey a valid court order." (*State of Ohio v. Andersen,* 570 F.2d at 1374).

And, while acknowledging that the "presumption rationale" in respect of documents *not* produced traditionally constituted the necessary justification for the imposition of sanctions under Rule 37 (*id.* at 1374-75) the court of appeals, at the same time, in effect held that neither that rationale — nor any other rational justification — need be present when "a party fails to obey an order" (*id.* at 1374). If the court of appeals' approach is permissible, then *any* sanction, no matter how harsh, can be imposed and will be deemed a reasonable exercise of discretion. The court of appeals cited this Court's holding in *National Hockey League, supra,* at 643, as support for this result, apparently because of the observation in *National Hockey League* that the imposition of sanctions may serve a "deterrent" purpose, ignoring this Court's qualification of that observation by "in appropriate cases."

If the interpretation of *National Hockey League* implicit in the court of appeals' decision is correct, this Court has effected an extremely significant and far-reaching change in the traditional understanding and application of the discovery sanctions. Indeed, commentary has suggested that *National Hockey League* should be interpreted as permitting or even as encouraging the imposition of sanctions for the purpose, not of effectuating discovery in a particular case, but for "affecting the conduct of parties not currently

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[*] As shown in Appendices B and D, the references to Andersen's "abandonment" of Swiss law and to delay of "more than a year" are based on fundamentally erroneous conclusions of both the district court and the Tenth Circuit.

before the court," *"The Deterrence Orientation", supra,* p. 1048, and as encouraging trial courts "to consider systemic needs" in selecting a sanction (*id.* at 1052) — *i.e.,* a sanction imposed on a single litigant in a particular case is to be justified by how, and to what extent, it addresses the sociological facts that "court dockets are more crowded [and] cases are more complex . . ." (*id.* at 1055).

Petitioner's view is that *National Hockey League* contained no such revolutionary rejection of the law requiring that the imposition of Rule 37 sanctions be a reasoned exercise of power rationally related to considerations of the pre-trial discovery process in a particular case. In *National Hockey League* there was an unjustified failure in discovery which prejudiced (or would prejudice) the moving party on the merits.

Accordingly, in *National Hockey League* this Court appears to be stating that a justifiable imposition of discovery sanctions can have a deterrent effect — *not,* as the Court of Appeals for the Tenth Circuit has in effect held here, that the powers of Rule 37 can be invoked *solely* for such purpose. If, however, *National Hockey League* is to be construed in the latter fashion, it raises serious and difficult constitutional questions:

> "serious constitutional obstacles must be acknowledged when sanctions are invoked purely for the purpose of deterrence. Although the sanctions of dismissal or default may be imposed after minimal civil process, criminal process may be essential where the court inflicts other sanctions for this purpose." *("The Deterrences Orientation," supra,* p. 1055).

The instant case is exemplary of numerous cases which have arisen in the short period of time since *National Hockey League* which have grappled with these questions. Surely, the number of cases involving these questions in the future will be considerable. This case thus presents the Court with

an opportunity to consider the important question of the extent to which Rule 37 sanctions may be imposed to limit a party's rights to fully contest its adversary's claims at trial and eliminate uncertainty in the wake of *National Hockey League.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

(Containing Opinions Below)

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OPINION OF TENTH CIRCUIT COURT OF APPEALS – 570 F.2d 1370 (1978)

STATE OF OHIO, Plaintiff-Appellee,

v.

ARTHUR ANDERSEN & CO.,
Defendant-Appellant.

ARTHUR ANDERSEN & CO.,
Petitioner,

v.

Honorable Sherman G. FINESILVER,
Respondent.

Nos. 77-1571 and 77-1591.

United States Court of Appeals, Tenth Circuit.

Argued and Submitted November 17, 1977.

Decided Feb. 9, 1978.

Rehearing Denied March 22, 1978.

[570 F.2d 1371]

H. Thomas Coghill, Denver, Colo. (Paul E. Goodspeed and Jay Horowitz of Coghill, Goodspeed & Horowitz, Denver, Colo., and Charles W. Boand of Wilson & McIlvaine, Chicago, Ill., were with him on the brief), for Arthur Andersen & Co., defendant-appellant in No. 77-1571 and petitioner in No. 77-1591.

Miles M. Gersh, Denver, Colo. (Harry L. Hobson, Luke J. Danielson and Holland & Hart, Denver, Colo., were with him on the brief), for plaintiff-appellee in No. 77-1571 and respondent in No. 77-1591.

Before McWILLIAMS, BREITENSTEIN and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Defendant-Appellant Arthur Andersen & Co. seeks relief from preclusionary and monetary sanctions imposed under Rule 37(b)(2), F.R.Civ.P., for noncompliance with discovery orders. In *Arthur Andersen & Co. v. Finesilver*, 10 Cir., 546 F.2d 338, cert. denied, 429 U.S. 1096, 97 S.Ct. 1113, 51 L.Ed.2d 543, we upheld the validity of the discovery orders. The basic facts are outlined in that opinion and will not be repeated here. Motions by plaintiff-appellee, the State of Ohio, for imposition of sanctions were held in abeyance pursuant to our stay order. 546 F.2d at 340. After denial of certiorari to review our decision, the district court held a hearing on the imposition of sanctions and entered a comprehensive order finding specific facts. This order is reported as *State of Ohio v. Crofters, Inc.*, D.C.Colo., 75 F.R.D. 12. The facts there found will be discussed here only insofar as is necessary to an understanding of this opinion. The district court said, Ibid. at 24-25:

> "It is inescapable that Andersen has followed a willful, deliberate and flagrant scheme of delay and resistance in discovery matters. In light of the opportu-

> nities to provide discovery of relevant documents, Andersen's opposition can only be characterized as contumacious and unjustified."

The court ordered, 75 F.R.D. at 25-26, that Andersen reimburse Ohio $59,949 for costs and expenses incurred in securing production and that Andersen was precluded from opposing Ohio's claims on two specified matters.

Our number 77-1571 is Andersen's direct appeal from the order imposing sanctions. No. 77-1591 is its petition for

mandamus which attacks the order as usurpation of judicial power. When the matter was first here, Andersen asserted that compliance was not required because it would violate the law of Switzerland. After reference to *Societe International v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255, we said, 546 F.2d at 341:

> "*Societe* implies that consideration of foreign law problems in a discovery context is required in dealing with sanctions to be imposed for disobedience and not in deciding whether the discovery order should issue."

We also said, Ibid. at 342:

> "When and if a subsequent order of the court imposes a harmful sanction, that order may then be reviewed."

The district court has now imposed sanctions. It makes no practical difference whether its order be reviewed on direct appeal or mandamus. Andersen is entitled to a review. We have here "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546-547, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528. Although the order may be collateral, we are convinced that under *Cohen v. Beneficial Loan Corp.*, it is appealable. Accordingly, No. 77-1591, the petition for mandamus, is dismissed.

The sole issue concerns the validity of the sanctions. The as yet untried case was filed in April, 1972, and was transferred to the District of Colorado on November 17, 1972. See *In re King Resources Company Securities Litigation*, Jud.Pan.Mult.Lit., 352 F.Supp. 975. On the comparatively simple question presented, we are confronted with a record of approximately 3,000 pages plus six large envelopes of material. Briefs of 172 pages, plus appendices, have been filed. The briefs are replete with invectives, maledictions, and denunciations which we ignore. We also ignore

Andersen's persistence in disparaging and derogating the trial judge and his actions.

Ohio loaned King Resources Company, KRC, eight million dollars allegedly in reliance on financial statements prepared by Andersen, 546 F.2d at 339-340. Fund of Funds, Ltd., FOF, an important customer of KRC, was a subsidiary of Investors Overseas Services, Ltd., IOS, a Canadian corporation with its principal place of business in Geneva, Switzerland. 75 F.R.D. at 15. Ohio claims that the relationship between KRC and FOF was not noted by Andersen in the KRC financial statements. Andersen denies any liability or wrongdoing. Its knowledge of the KRC-FOF-IOS connection is relevant and important to the lawsuit. 75 F.R.D. at 15.

On October 24, 1975, Ohio served on Andersen a request for production of documents including, as Request No. 26, material relative to Andersen's examination of IOS after January 1, 1967. During a November 7 conference, held pursuant to a local court rule, Andersen objected to discovery from other than its Denver office and raised the "foreign law" issue. The conference was unproductive and Ohio moved to compel response to its requests. On December 16 the court ruled that the requests were meritorious and ordered Andersen to produce the requested documents from its files within the United States. With regard to foreign secrecy laws, the court said:

> "• • • if there is going to be any question of foreign secrecy laws, they are going to have to be specified with great particularity and specificity."

On April 15, 1976, Ohio filed another discovery motion related to documents in An-

[570 F.2d 1373]

dersen's Geneva office and concerned with the relationship between KRC and IOS. Andersen's April 30 reply to this request had attached a

memorandum of Swiss counsel stating in general terms the requirements of Swiss law. Ohio then obtained, and tendered to Andersen, consents of FOF, and other related companies, to the production of the documents. Andersen filed a memorandum reasserting the Swiss law problem and rejecting the consents.

A May 27 order of the court directed Andersen to comply with the discovery requests. On June 17, Andersen moved for withdrawal of the May 27 order saying that it had been taken by surprise. In support of the motion it said that one of its lawyers was going to Geneva to consult with Swiss counsel:

> "to determine what documents and information may be available for examination by Ohio without violating Swiss criminal law, e. g., the opportunity to consult with Swiss counsel as to the legal effect of the consents filed by Ohio and determine what, if any, documents and information sought may legally be provided pursuant to such consents."

Earlier, it had represented to the court that the documents were not producible because of Swiss law and that the consents were inadequate. It is incomprehensible and inexplicable how Andersen could make such representations when it did not know what the documents contained and still had to send a lawyer to Switzerland to get the information. We agree with the statement of the trial court, 75 F.R.D. at 17, that Andersen's conduct

> "places in substantial doubt the credibility of both the written opinion of Swiss counsel and Andersen's own insistence that it had 'proceeded in good faith to do the best it can.' "

On June 25 the court denied Andersen's motion to stay the May 27 order and directed counsel to meet and discuss the discovery problems. On June 28 Andersen filed

a notice of appeal from the May 27 order. The court modified the order on July 2 and directed Andersen to make "every effort" to produce the documents by July 12. On July 9 Andersen appealed from that order. Ohio then moved for sanctions for noncompliance and Andersen filed in the court of appeals a petition for mandamus relief. At a hearing on July 22, ten days after the deadline set by the court, Andersen finally produced 84 newspaper clippings from its Geneva files and filed a status report saying that 110 additional documents were on their way from Geneva and were expected within the week. The explanation for delay in producing the newspaper clippings is unconvincing. See 75 F.R.D. at 18 n. 4. Andersen explained its failure to produce the 194 concededly producible documents by saying that it had failed to "focus" on the problem of delay, 75 F.R.D. at 18. That failure does not excuse disobedience of the court's order. On July 23, the court entered a protective order and directed that production be had by August 20. Documents trickled in for several months. Some came from sources other than Geneva, and some pursuant to an IOS consent that Ohio had presented to Andersen in May. See 75 F.R.D. at 19. The court said, Ibid., that the "dilatory response to our December 16, 1975 order hardly bespeaks of the good faith compliance which Andersen repeatedly asserts."

The facts in the instant case are distinguishable from those considered in *In re Westinghouse Electric Corporation Uranium Contracts Litigation,* 10 Cir., 563 F.2d 992. In that case Rio Algom was found in contempt for failure to obey a discovery order. It asserted that it could not comply because of Canadian law. In reversing we said that it had acted in good faith and had made a diligent effort to comply. Ibid. at 998. We also noted that the trial court had conducted no balancing of interests as required by *Societe.* Ibid. at 999. In the instant case Andersen acted in bad faith and the balancing was heavily on Ohio's side.

Another opinion relating to the same *Westinghouse* litigation, No. 77-1833, filed January 31, 1978, 570 F.2d 899, involved a protective order relating to the taking of a

[570 F.2d 1374]

deposition. We reversed on the peculiar facts of that case which are in no way comparable with those presented in the instant controversy.

On July 23 we granted a temporary stay of the May 27 and July 2 orders. 546 F.2d at 340. Our opinion upholding those orders was filed on December 1, 1976, and the mandate issued on January 10, 1977. The Supreme Court denied certiorari on February 22, 1977. See 429 U.S. 1096, 97 S.Ct. 1113, 51 L.Ed.2d 543. On January 19 Ohio renewed its request for the imposition of sanctions. At an April 15 hearing Andersen conceded that some of the documents ultimately produced after much delay were from sources other than Geneva and said that on the advice of Swiss counsel, it had decided to take the "risk" of violating Swiss law by producing the other requested documents. In its May 23, 1977 order, 75 F.R.D. at 20, the court found that "Andersen deliberately and willfully refused discovery for an unreasonable period of time without justification." The finding has overwhelming support in the record.

Andersen argues that the court failed to consider and recognize Swiss law. In its December 16, 1975, order the court referred to "foreign secrecy laws" and said that any questions in that regard should be specified with "particularity and specificity." The specification did not occur for many months. Without the specifics the court had no need to determine Swiss law. Andersen could not supply the specifics because it waited until the latter part of June to have one of its counsel travel to Switzerland to examine the requested documents and "consult with Swiss counsel to determine what documents and information could and could not be made available in view of the applicable Swiss

secrecy laws." After the consultation, documents began to come in slowly. At the April 15, 1977 hearing, Andersen in effect withdrew its reliance on Swiss law. No occasion ever arose for the court to decide a specific point of Swiss law. Indeed, the record convinces us that Andersen's claims with reference to Swiss law were no more than diversionary tactics.

In opposing the sanctions, Andersen emphasizes that it finally produced the documents. Final production is not determinative. The Rule permits a sanction when a party "fails to obey an order." Andersen refused willfully to obey for an unreasonable time on the contrived excuse, eventually abandoned, of the Swiss secrecy laws. The ultimate, and reluctant, production of documents, more than a year after a legitimate request, does not absolve Andersen of the charge that it willfully failed to obey a valid court order.

Rule 37(b)(2), F.R.Civ.P., provides in pertinent part:

> "If a party • • • fails to obey an order to provide or permit discovery • • the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> • • • • • •
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence."

The court ordered that Andersen "shall not oppose or introduce any evidence opposing" Ohio's claims that (1) on and before April 10, 1970 Andersen had information relating to the financial condition and liquidity of FOF which should have led it to realize that FOF "would imminently cease to purchase natural resource interests from KRC," and (2) that on and before April 24, 1970, Andersen knew that KRC was committed "to provide financing

to IOS and was negotiating an agreement to give KRC control of the operation of IOS." 75 F.R.D. at 25-26.

Andersen argues that the use of preclusionary sanctions is premised on the presumption that the information withheld would have supported its opponent's case and that the presumption is not applicable here because of final production. The presumption rationale is explained in *Hammond Packing Co. v. Arkansas,* 212 U.S.

[570 F.2d 1375]

322, 350-351, 29 S.Ct. 370, 53 L.Ed. 530, which upheld a default judgment entered after disobedience of a discovery order. The Advisory Committee's Note to Rule 37, 28 U.S.C.A. Rule 37, p. 225, says that the Rule accords with *Hammond*.

In *Societe Internationale v. Rogers,* 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255, the Court disapproved the sanction of dismissal for noncompliance with a discovery order. In so doing it distinguished between inability to comply and willful or bad faith non-compliance. Ibid. at 212, 78 S.Ct. 1087. In *Norman v. Young,* 10 Cir., 422 F.2d 470, we discussed both *Hammond* and *Societe* and upheld the sanction of dismissal, noting, Ibid. at 474, that the disobedience was "willful" and "a direct flaunting of the Court's authority." The instant case presents a similar situation.

In *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747, the Court, in upholding the sanction of dismissal for disobedience of a discovery order, discussed Rule 37(b)(2). It held that the trial court did not abuse its discretion in ordering dismissal because of a party's "flagrant bad faith" and its counsel's "callous disregard" of their responsibilities. Ibid. at 643, 96 S.Ct. 2778. The Court emphasized that sanctions must be available "in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to

such conduct in the absence of such a deterrent." Ibid. In the circumstances presented, the preclusionary sanctions were just and authorized by the Rule.

In addition to the preclusionary sanctions, the court ordered Andersen to pay Ohio "$59,949 as a reasonable reimbursement for costs and expenses." 75 F.R.D. at 25. Rule 37(b)(2), F.R.Civ.P., lists several sanctions which may be imposed for failure to comply with a discovery order and concludes with this provision:

> "In lieu of any of the foregoing orders [for sanctions] or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

Ohio filed a statement of its expenses, the details of which are not attacked by Andersen. The breakdown of these expenses shows, 75 F.R.D. at 22 n. 8:

Incurred to July 23, 1976	$16,460
Incurred in connection with Tenth Circuit proceedings	27,997
Incurred in connection with Supreme Court proceedings	15,492
TOTAL	$59,549

Andersen argues that the expenses for the period before July 23 should not be awarded because the delay did not prejudice Ohio and because during that period Andersen did not fail to obey a court order. In October, 1975, Ohio moved for production. Many conferences and hearings were held to resolve the dispute over production. On May 27, 1976, the court entered its order compelling production. Rule 37(a)(4) provides that if a motion to compel discovery is granted,

> "The court shall • • • require the party • • • whose conduct necessitated the motion • • • to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

This provision for the payment of reasonable expenses to secure an order compelling production applies. The record facts justify the award.

Andersen's next objection goes to the appellate expenses. It says that the award conflicts with Rule 38, F.R.A.P., pertaining to the award by the court of appeals of damages and costs resulting from frivolous appeals. There is no conflict. Rule 37(b) permits the district court to award

reasonable expenses and attorneys' fees for disobedience of a discovery order. Andersen unsuccessfully attacked the discovery orders both in the court of appeals and the Supreme Court. Its argument that the court of appeals recognized the seriousness of the problem of the Swiss secrecy laws does not impress us. Conflicts arising from the interaction of domestic law relating to discovery and foreign secrecy laws are important and troublesome. When the case was here before, we did not know that Andersen had waited until the end of June, 1976, to investigate the Swiss documents to determine the applicability of the Swiss laws and the adequacy of the consents which Ohio had provided. We rejected Andersen's general reliance on Swiss law and now learn that we should have awaited the specifics.

To secure production, Ohio had to oppose Andersen in both the court of appeals and the Supreme Court. The

award of the appellate expenses and attorneys' fees was just and proper under Rule 37(b)(2).

The record before us shows both flagrant bad faith and callous disregard. Rule 1, F.R.Civ.P., provides that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." The trial courts must administer the rules to attain the proclaimed objective. See *Robison v. Transamerica Insurance Co.*, 10 Cir., 368 F.2d 37, 39. Enforcement of the rules requires sanctions for disobedience of valid court orders. The trial court did not abuse its discretion when it imposed the sanctions.

In No. 77-1571, the orders of the district court are affirmed. No. 77-1591 is dismissed.

JUDGMENT OF TENTH CIRCUIT COURT OF APPEALS

JANUARY TERM – FEBRUARY 9, 1978

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Appeal from the United States District Court for the District of Colorado (D.C. No. C-4628)

Before Honorable Robert H. McWilliams, Honorable Jean S. Breitenstein and Honorable William E. Doyle, Circuit Judges

STATE OF OHIO,
Plaintiff-Appellee,

v.

CROFTERS INCORPORATED, a corporation; DEE GEE COMPANY; SIDNEY D. GRIFFITH; HARRY A. GROBAN; GERALD A. DONAHUE; KING RESOURCES COMPANY; JOHN M. KING; WILLIAM V. COFFEY; THE COLORADO CORPORATION; REGENCY INCOME CORPORATION; ELLIOT KEEN WOLCOTT; DUN & BRADSTREET, INCORPORATED; FINANCIAL DATA RELATIONS INCORPORATED; RONALD R. HOWARD,
Defendants,

ARTHUR ANDERSEN & COMPANY,
Defendant-Appellant.

No. 77-1571

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District

of Colorado, and was consolidated with a petition for writ of mandamus filed by appellant as No. 77-1591 in this Court for purposes of record, briefing and oral argument. The appeal was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. The mandate shall issue forthwith.

/s/
HOWARD K. PHILLIPS
Clerk

ORDER OF TENTH CIRCUIT COURT OF APPEALS ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

MARCH TERM – MARCH 22, 1978

Before Honorable Oliver Seth,
Circuit Judge

Honorable Jean S. Breitenstein,
Circuit Judge

Honorable Robert H. McWilliams,
Circuit Judge

Honorable James E. Barrett,
Circuit Judge

Honorable William E. Doyle,
Circuit Judge

Honorable Monroe G. McKay,
Circuit Judge

Honorable James K. Logan,
Circuit Judge

STATE OF OHIO,
Plaintiff-Appellee,

v.

CROFTERS INCORPORATED, a corporation; DEE GEE COMPANY; SIDNEY D. GRIFFITH; HARRY A. GROBAN; GERALD A. DONAHUE; KING RESOURCES COMPANY; JOHN M. KING; WILLIAM V. COFFEY; THE COLORADO CORPORATION; REGENCY INCOME CORPORATION; ELLIOT

No. 77-1571

KEEN WOLCOTT; DUN & BRADSTREET, INCORPORATED; FINANCIAL DATA RELATIONS INCORPORATED; RONALD R. HOWARD,
Defendants,
ARTHUR ANDERSEN & COMPANY,
Defendant-Appellant.
} No. 77-1571

This matter comes on for consideration of the appellant Andersen's petition for rehearing, together with a suggestion for rehearing en banc, which was ordered filed on March 8, 1978 following the recall of the mandate.

Upon consideration whereof, it is ordered that the petition for rehearing is denied by Judges McWilliams, Breitenstein and Doyle, to whom the cause was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judge William J. Holloway, Jr. did not participate in any matters in this appeal, nor in the rehearing matters reflected by this order.

/s/
HOWARD K. PHILLIPS
Clerk

OPINION OF U. S. DISTRICT COURT FOR THE DISTRICT OF COLORADO – 75 F.R.D. 12 (1977)

In re King Resources Company Securities Litigation.
STATE OF OHIO, Plaintiff,

v.

CROFTERS, INCORPORATED, Dee Gee Company, a partnership, Sidney D. Griffith, Bernice S. Groban as Executrix of Harry A. Groban, Deceased, Gerald A. Donahue, King Resources Company, John M. King, William V. Coffey, the Colorado Corporation, Regency Income Corporation, Robert B. Crew, Jr., Elliot Keene Wolcott, Arthur Andersen & Company, a partnership, Dun & Bradstreet, Incorporated, Financial Data Relations, Incorporated, and Ronald R. Howard, Defendants.

Civ. A. No. C-4628, M.D.L. Docket No. MDL-79-1.

United States District Court, D. Colorado.
May 23, 1977.

[75 F.R.D. 14]

SHERMAN G. FINESILVER, District Judge.
ORDER NO. 1977-14

ORDER IMPOSING SANCTIONS AGAINST DEFENDANT ARTHUR ANDERSEN & COMPANY

Pursuant to Rule 37, Federal Rules of Civil Procedure, Plaintiff, State of Ohio, has moved the Court to impose sanctions against defendant Arthur Andersen & Company for failure to comply with discovery orders and reasonable requests of Ohio for discovery, including production of documents.

On April 17, 1972, Ohio filed this action in the United States District Court for the Southern District of Ohio against Andersen and others. Jurisdiction is based on § 22(a)

of the Securities Act of 1933 as amended; 15 U.S.C. § 77v(a), and on § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa. King Resources Company (KRC) is one of the defendants. The Judicial Panel on Multidistrict Litigation transferred the case to the District of Colorado for coordinated proceedings with other cases arising out of the affairs of KRC. *In re King Resources Company Securities Litigation,* 352 F.Supp. 975 (Jud.Pan.Mult.Lit.1972). Suit against King Resources Company has been stayed by an order in bankruptcy proceedings. Several of the numerous cases relating to King Resources are listed in the appendix.

[75 F.R.D. 15]

Defendant Arthur Andersen & Co. (Andersen) is a national accounting firm with its principal office in Chicago, Illinois and having offices throughout the world.

The motion for sanctions arises out of defendant Andersen's response to discovery requests and its response to several court orders. The court orders involved were entered on December 16, 1975, May 27, 1976, July 2, 1976 and July 22 and 23, 1976.

A matter relating to discovery of documents was previously filed by Andersen in the Tenth Circuit Court of Appeals and rejected by that court. *Arthur Andersen & Co. v. Finesilver,* 546 F.2d 338 (10th Cir. 1976), *cert. denied,* 429 U.S. 1096, 97 S. Ct. 1113, 51 L.Ed.2d 543 (1977).

One of several hearings on sanctions was commenced on July 22, 1976. That hearing was held in abeyance pursuant to a stay order entered by the Court of Appeals in *Arthur Andersen & Co. v. Finesilver, supra.* A further hearing on sanctions was held on April 15, 1977.

Upon review of the totality of evidence, and briefs and statements of counsel we impose sanctions against Andersen. We find that the actions of Andersen were without good cause or substantial justification, have inordinately delayed resolution of this litigation, and have resulted in

waste of time and unnecessary expense to the State of Ohio. In a flagrant and deliberate way Andersen has undermined the basic aim of the Federal Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action" brought before the federal courts. Fed.R.Civ.P. 1. Plaintiff is entitled to reimbursement for its reasonable expenses and attorneys' fees in connection with discovery and other relief as set forth below.

CHRONOLOGY OF EVENTS

In April and May of 1972, the State of Ohio purchased two KRC notes in the total face amount of eight million dollars. Plaintiff alleges that in deciding whether to purchase the notes it relied upon certain KRC financial statements and opinions prepared by Andersen. The notes were not redeemed at maturity because of the financial collapse of KRC.

In its complaint, Ohio contends that the financial statements and opinions released by Andersen were false and misleading. In particular, Ohio claims that Andersen's financial statements did not indicate the extent to which KRC was dependent upon a single customer, the Fund of Funds, Ltd. (FOF). FOF, it is alleged, accounted for 38% of KRC's gross profit in 1968 and 65% in 1969. FOF was a mutual fund controlled by Investors Overseas Services, Ltd. (IOS). Due to a series of questionable business practices both FOF and IOS were forbidden by the Securities and Exchange Commission from doing business in the United States. Plaintiff states that the SEC repeatedly announced that it opposed the development of ties between FOF, IOS and American corporations, specifically mentioning KRC.

While IOS was a Canadian corporation, its principal place of business was Geneva, Switzerland. Andersen provided various accounting services to FOF and IOS from its

Geneva office. It was in the Geneva office that Andersen audited the books of FOF and IOS.

It is alleged that in the late 1960's KRC unsuccessfully attempted to take over FOF. The takeover activity resulted in a substantial cash drain from KRC and FOF. Ohio contends that it became quite likely that KRC would lose the business of its largest customer, but this fact was not noted in the KRC financial statements. Andersen denies any liability or wrongdoing in this suit. We note at the outset that Andersen's knowledge of the KRS[*sic*]-FOF-IOS connection is of obvious relevance and importance to the lawsuit.

Discovery has been extensive and has spanned the United States and foreign countries. On October 24, 1975, during the latter phase of discovery Ohio served Andersen with a request for production of:

> Reports of examination, draft reports, working papers, workpapers, correspondence files and permanent files of Andersen relative to examination after January 1, 1967 of IOS.

[75 F.R.D. 16]

On December 16, 1975, the court ruled that the request was meritorious and that Andersen should produce the requested documents from its files within the United States.

On April 15, 1976, plaintiff filed a "Motion to Compel Further and Complete Discovery Concerning I.O.S.". In the motion Ohio asked for production of documents in the Geneva, Switzerland office. Andersen opposed the Motion to Compel by stating, *inter alia,* that the Swiss Code of Obligations, the Swiss Penal Code and the Swiss Federal Banking Law all prohibited release of the documents to plaintiff. Andersen tendered an opinion of Swiss counsel, prepared at Andersen's request, to the effect that Andersen would be in violation of Swiss Criminal law if it revealed any documents

in its Geneva file. Andersen flatly stated that if it "were ordered to produce documents or obtain data from its Geneva office, Andersen could not do so without subjecting its personnel to the penal and civil sanctions imposed by the laws of Switzerland". *Memorandum in Opposition to Plaintiff's Motion to Compel,* filed April 30, 1976 at 23.

Plaintiff, on May 24, 1976, tendered certified consents to disclosure of the IOS and FOF documents held in Geneva on May 24, 1976. The FOF consents were signed by all FOF directors, its president and secretary. The Canadian liquidator of FOF and IOS, appointed by the Supreme Court of Ontario, also signed consents to disclosure on behalf of FOF and IOS. On the day that the Ohio consents were filed with the court Andersen submitted a memorandum in which it denied that the consents were of any significance to the legal problems involved in disclosure of the Swiss documents. Andersen stated:

> Ohio now puts forth a few purported waivers and consents. Initially, it is important to note that the court cannot give any weight to the consents Ohio has submitted because it is purely an unsupported assumption on Ohio's part that the consents have any binding effect whatever upon the entities involved. . . . Moreover, even if they were proper and binding, the purported waivers and partial waivers and consents relied upon by Ohio could not by any stretch of the imagination protect Andersen or its personnel against criminal and civil liability under the laws of Switzerland. A great many other consents would be required in view of the multifaceted and far flung operations of IOS and its 80 or more subsidiaries.

While we do not wish to go into extensive discussion of Andersen's statements at this point, it should be noted, and we find, that Andersen, by its later statements and conduct, proved each of the objections to be illusory.

We ruled on the Motion to Compel at our May 26, 1976 hearing.[1] There we observed that plaintiff had made a good showing for the need to discover the contents of the Geneva files and granted the Motion to Compel. Thereafter on June 17, 1976, Andersen filed a motion requesting the court to withdraw the discovery order alleging that Andersen was taken by surprise by the order directing discovery in Geneva. In its motion, Andersen again asserted that the waivers or consents to disclosure obtained by Ohio were "obviously inadequate to cover the broad discovery requests". In the same motion, however, Andersen stated that during the time between the filing of the consents by Ohio, and the May 27th ruling, it "did not have adequate time to determine the extent to which such limited consents might enable it to produce any of the documents".

Thus, between May 26, 1976, when we entered our order, and June 17, 1976, when Andersen filed its motion to stay, no serious attempts were made to comply with the court's order. It also became obvious as future events unfolded that despite 15 months of protestations from defendant Andersen, its American counsel had no clear understanding of the contents of the

[75 F.R.D. 17]

Geneva files. Without such an understanding, the assertions of the illegality of production of any documents and the denial of the import of the consents obtained by Ohio revealed themselves as mere charades intended to prevent both Ohio and the court from approaching the discovery question in an informed and professional manner. The concession that Andersen had not examined its files upon receipt of the original request for production places in substantial doubt the credibility of both the

[1] Our bench order of May 26, 1976 was entered on the Court's Registry of Action on May 27, 1976. We shall refer to the order, as do the litigants, as the May 27th order.

written opinion of Swiss counsel and Andersen's own insistence that it had "proceeded in good faith to do the best it can". *Supp. Memorandum in Opposition to Plaintiff's Motion to Compel* at 4. Counsel for Andersen finally inspected the Geneva files between June 18 and June 25, 1976.

On June 25, 1976, we denied Andersen's Motion to Stay our May 27th order. In the June 25, 1976 order, we emphasized our concern that discovery had been inordinately delayed. We observed that professional cooperation among counsel would assist in the orderly progression of the lawsuit and that cooperation should be forthcoming. We directed a meeting between counsel to explore resolution of discovery matters. Prior to any meeting with plaintiff, Andersen filed a notice of appeal of our May 27, 1976 order.

As might be anticipated, the meeting between Ohio and Andersen was not fruitful. Ohio proposed that as to documents which Andersen claimed foreign law "privilege" Andersen "exert every effort" to obtain the required consents or waivers. As to those documents which could not be produced without Swiss law problems, Ohio proposed that Andersen list the documents and state with specificity the ground for non-production. Andersen refused to agree to this procedure. Instead, Andersen informed the court that it intended to follow its own procedures. *Report of Arthur Andersen & Co.*, filed July 1, 1976. Andersen's proposal was that its Swiss counsel would inform the court of what documents or portions of documents could be produced; that those documents would only be produced upon Ohio agreeing to a protective order acceptable to Andersen; and that for documents not produced, Andersen would list the reasons for non-production. Despite the similarity between the proposals, Andersen refused to include a provision that it would exert every effort to obtain the necessary consents.

On July 2, 1976, we withdrew our May 27, 1976 order. In its place, however, we adopted the Ohio formulation

that Andersen exert every effort to obtain consents needed to produce the totality of the documents. We set a deadline of July 12, 1976 for production of documents. We also stated that the court would impose sanctions should it appear that claims of foreign law privilege were not made in good faith. Seven days later Andersen appealed the order to the Tenth Circuit of Appeals. Andersen also filed for a writ of mandamus.

Most revealing is the memorandum filed in this court in support of the motion to stay. There, Andersen stated that its search of the Geneva files identified approximately 220 documents which were responsive to Ohio's discovery request. Of the 220, Andersen had determined that the "responsive portions" of 190 documents could be produced without violating Swiss law as a result of *"certain consents recently furnished to [Andersen] by plaintiff"*. (Emphasis added) It was further stated that the responsive portions of the 190 documents would be produced during the week of July 12, 1976.

The week of July 12, 1976 arrived and passed without production of a single document by Andersen.

A previously scheduled hearing was held on July 22, 1976. The original purpose of the hearing was the submission of a pretrial order.[2] The court's attention was soon drawn away from the consideration of the

[75 F.R.D. 18]

pretrial order

and to various discovery disputes.[3]

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[2] A satisfactory pretrial order was not filed on that date, in part, because Andersen declined to stipulate to *any* facts as uncontroverted.

[3] During this litigation there have been, and continue to be, a myriad of discovery matters which have required court intervention. Many of these disputes have been resolved favorably to Arthur Andersen & Company.

On July 13, 1976, plaintiff had filed a motion for sanctions. It became obvious that the court would consider the Geneva documents question at the pretrial conference. Two days before the conference Andersen filed two memoranda in opposition to the imposition of sanctions. In one, Andersen unequivocally stated *"Prior to the service of Ohio's motion* (for sanctions), the responsive portions of all those documents, and the answers to interrogatories, *had been tendered to Ohio"*. (Emphasis in original). Andersen also accused Ohio of bad faith, saying:

> Indeed, as Ohio is aware—although for its own purposes, it has chosen to inform this court of the fact in only the most elliptical terms—Andersen *has produced* for Ohio's inspection a substantial portion of the documents in question. Further, by virtue of its most recent efforts to finally resolve this discovery dispute . . . Andersen will have produced *all* the documents relating to (the issue). The net result: there are no such documents left for this court to compel Andersen to discover; there is no non-compliance to serve as a predicate for sanctions. (Emphasis in original).

In fact, however, as of the date of filing the memoranda, Andersen had not produced a single document from its Geneva file. What Andersen had done was to inform Ohio by letter that if the court entered a protective order acceptable to Andersen, it would make available only the responsive portions of relevant documents. Further, Andersen stated that "production" would be made only at the Geneva office.

On the morning of the pretrial conference Andersen finally delivered some "documents" to counsel for Ohio. This was the first time since the request for production had been served on Andersen on October 24, 1975, that anything from the Geneva office had been submitted to Ohio. At the hearing dealing with sanctions on July 22,

1976, Andersen represented to the court that it had provided Ohio with 84 of the 220 responsive documents.

What was the nature of these documents which might subject Andersen and its European employees to severe civil and criminal liability? What was the nature of these documents which Andersen had withheld for ten months because of the extensive consents need [*sic*] for production? The documents tendered to Ohio on the morning of July 22, 1976 included 84 newspaper clippings.[4] While Andersen delivered these clippings and other documents in July, they had been identified as responsive to the discovery request over a month earlier when one of Andersen's counsel went to Geneva to examine the files. Nonetheless, the documents were not turned over until July because instead of hand carrying the items on his return to the United States, counsel mailed the documents from Geneva to Denver, which necessitated the further delay intrinsic in clearance with the United States Customs Office. This episode highlights Andersen's tenuous argument of "good faith" in expediting the discovery and is illustrative of its continued attempt to thwart timely discovery.

At the July 22 pretrial conference, Andersen admitted error in not producing any documents by the July 12, 1976 deadline. Asked by the court why had the documents been delivered in such a tardy fashion, counsel replied that he was not "focusing on delay" as an important consideration. This statement was made despite the fact that the timetable for discovery was of great importance to the court and a

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[4] At our April 15, 1977 hearing on the motion for sanctions, counsel for Andersen told the court that the clippings had to be individually reviewed for writings or stray marks. A deposition of co-counsel, however, revealed that there was never any document by document review of newspaper clippings or interim financial statements.

topic of con-

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cern at many of the court's hearings and in its written orders.

To move the case forward the court signed a protective order. Order No. 1976-12 (July 23, 1976). The order was not out of the ordinary. It merely stated that the use of any of the Geneva documents would be limited to the purposes of the immediate lawsuit. Upon request, the order could have been entered on [*sic*] October 1975.

The fact that Andersen was willing to produce only portions of relevant documents served as another impediment. Andersen, in consultation with its Swiss lawyer, assumed the role of self-appointed censor, editor and arbiter. It decided what documents (or portions thereof) would be needed by Ohio and produced only those portions. The stated reason was that by excising portions of the documents before production, Andersen would not need to acquire certain additional waivers or consents for disclosure.

The effect of this censorship on the discovery timetable can be seen by reviewing a typical example. Certain edited documents were delivered to Ohio in late July, 1976. In August, Ohio requested that the censored portions be supplied. Andersen was unable to then respond to this request because the necessary consents had not been obtained. On December 28, 1976, Andersen received the needed waiver—a signed consent from the Canadian counsel for the IOS court appointed liquidator. The complete copies of the documents, however, were not delivered to Ohio for another month.

What is curious about Andersen's four month attempt to obtain the needed IOS consent is that the party contacted was Canadian counsel for the IOS liquidator. Ohio

had presented Andersen with the consent of the liquidator in May of 1976, at which time Andersen rejected any possibility that such a consent could be of any value.

Nearly a dozen of the documents eventually produced were obtained not from Switzerland, but from file copies maintained in the United States. In December of 1975 we ordered Andersen to delve into its U.S. files and produce copies of the Swiss documents which existed in this country. Although the court required prompt production, the documents were not delivered, at the earliest, until July of 1976. Additional documents trickled in from Chicago, Newark, New York and other offices—some as late as January, 1977. Such a dilatory response to our December 16, 1975 order hardly bespeaks of the good faith compliance which Andersen repeatedly asserts.

On December 1, 1976, the Tenth Circuit entered its opinion on the discovery matters on Andersen's appeal. *Arthur Andersen & Co. v. Finesilver, supra.* The court found the interlocutory appeal premature and that this court had not usurped its authority in entering the discovery orders. Thereafter, Andersen applied to the Court of Appeals for a stay order. The Court denied the stay, noting that the case had been filed in 1972, and that it was time the action moved forward. Andersen's petition for a writ of certiorari was denied by the United States Supreme Court. 429 U.S. 1096, 97 S.Ct. 1113, 51 L.Ed.2d 543 (1977). Thereafter, we scheduled a hearing on plaintiff's motions for sanctions. That hearing was held on April 15, 1977, at which time both Ohio and Andersen were heard.

At the hearing we were informed by Ohio that Andersen had produced, only the day before, "several thousand

pages of Andersen documents" which were the subject of a stipulation of discovery entered on January 5, 1976.[5]

At the hearing Andersen, through its counsel, made the surprising admission that production of the Geneva documents represented no great threat of Swiss criminal prosecution. The court was told that Andersen's Swiss counsel now believed that

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the waivers obtained were adequate protection against criminal prosecution and that Andersen was willing to take "the risk". In May of 1976, however, Andersen stated that the Swiss prosecutor would be *obliged* to begin criminal proceedings should Andersen reveal the contents of its Geneva files. Andersen now asserts its good faith in producing portions of 218 of 220 relevant documents by April 15, 1977. In contrast to this assertion, Andersen's year and a half delay in production bespeaks of a willful attempt to withhold production of producible documents. We find willful and flagrant bad faith and a callous disregard of counsel's responsibilities. Andersen could have complied easily and expeditiously to the discovery orders entered by the court and the reasonable discovery request of Ohio.

Discovery rules are designed to inform each party of the basis of his adversary's claim or defense and to provide access to all relevant information. C. Wright, *Handbook on the Law of Federal Courts* § 81 (3d ed. 1976). Andersen's conduct in this matter has been marked by delay, excuse, recalcitrance and indifference. It's [*sic*] defense of good faith and cooperation is ill-fitting.

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[5] These documents are believed by the court to be from a source other than the Geneva files. We comment only because their production at this date is indicative of Andersen's response to the duties of good faith and cooperation imposed under the Federal Rules of Civil Procedure.

In sum, we find that (a) the material sought by Ohio from Andersen was relevant to the issues in the suit; (b) Andersen had the ability to expeditiously comply with Ohio's discovery request; (c) a court order was entered directing Andersen to exert every effort to comply with the discovery requests; and (d) Andersen deliberately and willfully refused discovery for an unreasonable period of time without justification.

SANCTIONS UNDER FEDERAL RULES OF CIVIL PROCEDURE

I.

Rule 37 of the Federal Rules of Civil Procedure was developed to give trial courts the tools they needed to enforce discovery procedures. Discovery under the Rules are designed to proceed at the initiative of the parties and under their control. Generally, judicial management and involvement in the discovery process is not required unless one party challenges the activity of an adversary. The sanctions aspect of Rule 37 provides for alternative approaches by the court to ensure that the spirit and object of discovery under the rules are maintained.

Under the Rule, where the court has once established the right of the moving party to the information requested, disobedience of the court's order is punishable without further consideration of the objections presented. Fed.R.Civ.P. 37(b). The sanctions provided for in the Rule mirror the degrees of involvement of the trial court in the pre-trial procedure. Where the parties seek a ruling on the disputed right to discovery, Rule 37(a) imposes no sanction unless the objection of the reluctant party is without substantial justification. In such a case, Rule 37(a)(4) provides for imposition of costs against the recusant. But where the right to discovery has once been established, and the request enforced by an order compelling discovery, disobedience is punishable by contempt, by dismissal or default judgment,

by an order establishing the existence of certain facts alleged by the moving party, or by an order precluding the delinquent from supporting or opposing designated claims or defenses or prohibiting him from introducing designated matters into evidence. Fed.R.Civ.P. 37(b)(2).

Within these broad parameters, the particular sanction to be imposed is within the discretion of the trial court. Rule 37 offers little guidance. The enumerated sanctions of Rule 37(b) are not exclusive; the court may respond to noncompliance by issuing "such orders in regard to the failure as are just . . . ." Fed.R.Civ.P. 37(b)(2).

Without adequate sanctions the procedure for discovery would be ineffectual. *See* 8 C. Wright and A. Miller, *Federal Practice and Procedure,* § 2281 (1970); 4 Moore, *Federal Practice,* § 37.03; and Rosenberg, *Sanctions to Effectuate Pretrial Discovery,* 58 Columbia L.Rev. 480 (1958).

In the usual litigation, the court need not resort to Rule 37 because counsel recognize

their duty to permit discovery and, in a professional manner, regulate the progression of the lawsuit with minimal court intervention. Such self-regulation is needed if the Federal courts are to be a forum in which every litigant can receive close and careful scrutiny of his claim.

In the last several years the caseload pressure placed on the Federal courts has been tremendous. As social institutions lose their persuasive force, more reliance is placed on the legal system for resolution of disputes. *See* E. Schuyr, *Law and Society, a Sociological View* (1968); Selznick, *Legal Institutions and Social Controls,* 17 Vand.L. Rev. 83 (1963). As an example, in 1971 this district experienced

294 case filings per judge. That number increased in 1975 to 443, forty-one cases over the national figure for federal district courts. *Management Statistics for United States Courts* (1976). We cannot hope to give each litigant his due unless the courts can be aided by competent counsel acting in a professional manner.

Over a decade ago, an observation was made in *Shapiro v. Freeman,* 38 F.R.D. 308, 312 (S.D.N.Y.1965):

> The Federal Rules of Civil Procedure were designed as an affirmative aid to substantive justice, and those who choose to read them restrictively do so at their peril. It is time that (discovery) be conducted by members of the bar in a cooperative manner, in accordance with both the letter and spirit of the rules, without petty bickering and without intervention by busy courts with more important matters pressing for attention. It is clear to us that (counsel) has no conception of his obligation to observe the rules 'as an officer of the court' or otherwise. Rather, he appears to be bent on concealing vital facts, or, at best, waging a war of [justification for his conduct] . . . . As a result, the cooperative atmosphere envisaged by the federal rules has been poisoned by antagonism.[6]

Cooperation among counsel is not only helpful, but required, and the court has the duty to ensure that such cooperation is forthcoming. *See, e.g., Berger v. Brannan,* 172 F.2d 241 (10th Cir. 1949).

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[6]Subsequent to our writing this opinion, the Tenth Circuit Court of Appeals affirmed a dismissal for failure to comply with discovery orders. The court stated: "The orders of the [trial] court must be followed, and the Federal Rules must be followed in order for the entire machinery to function at all." *Murphy v. Fatzer,* unpublished, No. 76-1265 (10th Cir. June 1, 1977). *See also, Stanley v. Continental Oil Co.,* 536 F.2d 914 (10th Cir. 1976) and *Glezos v. Blackett,* unpublished, No. 76-1225 (10th Cir. April 25, 1977).

II.

The necessary cooperation by Andersen envisioned by Rule 37 has not been present in this case. Documents were not disclosed in full. Attempts to obtain necessary consents began in earnest only in August of 1976, a full eleven months after the first notice was received from Switzerland that such consents would be required. Even as late as April 15, 1977, the date of the most recent court hearing, not all of the admittedly responsive documents have been produced. It is an understatement to say that this case has unduly and unnecessarily taxed the judicial time available to the court. Litigants in this and other cases had to be informed that their causes could not be considered in a timely fashion because of the commitments this court made in response to Andersen's recalcitrant discovery practices.

Delay in the administration of justice has long been the subject of criticism. In 1906 Dean Pound addressed the American Bar Association in his now classic essay, *The Causes of Popular Dissatisfaction with the Administration of Justice:*

> The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point . . . It leads counsel to forget that they are officers of the courts and to deal with rules of law and procedures exactly as the professional football coach with the rules of the sport.

29 *Reports of the American Bar Association,* 395 (1906). *See also,* M. Pirsig, *Professional Responsibility,* 319 (1970).

Conduct such as that displayed by counsel for Andersen cannot be tolerated if the judicial system is to continue to be a forum for expedient and fair resolution of controversy. We are not unmindful that at times trial strategy suggests that

counsel fight his adversaries on every ground, even those that appear untenable. While such trial tactics may serve a purpose, trial tactics that hinder, delay and add to the cost of litigation should not determine an attorney's conduct. It is true that the Code of Professional Responsibility mandates that a lawyer must represent a client zealously. See *Canon* Seven. Nonetheless, counsel must also recognize that "respect for judicial rulings is essential to the proper administration of justice". Ethical Consideration 7-22. In this case, the ethical obligations of counsel appear to have taken a subservient position to tactical considerations.

In a sense, the instant motion for sanctions is not simply a proceeding between the State of Ohio on one hand and Arthur Andersen & Company on the other. There are other litigants in this case who have had (and continue) to bear the cost and aggravation of countless hearings and delays. In addition, resolution of problems in other cases was delayed because of Andersen's conduct here.

In observing the dilatory tactics pursued by Andersen, another factor has been of concern to this court. In this case Andersen's opponent is a State of the Union. Like Arthur Andersen & Company, Ohio's financial resources in prosecuting this lawsuit are, for practical purposes, inexhaustible. Had Andersen's opponent been less affluent, however, it is a foregone conclusion that discovery of the Geneva documents simply would not have been accomplished.

In response to our order Ohio has submitted a statement of costs relative to this discovery question.[7] The work accomplished, fees and miscellaneous expenses were item-

[7] Plaintiff's Consolidated Statement of Expenses Incurred in Attempting to Obtain Discovery from Defendant Andersen Pursuant to this Court's Orders, filed March 15, 1977. Plaintiff also filed statements relating to costs on February 24, 1977 and July 23, 1976.

ized and are listed in the margin.[8] The fees and expenses incurred from October, 1975, when Ohio first served its request for production, to March 15, 1977, when its statement of expenses was filed, totals $59,949.

Andersen disputes any inclusion of expenditures made in connection with its appeals and petitions to the Court of Appeals and Supreme Court. We expressly find that plaintiff's expenses made in opposing those appeals and petitions are properly included in the award of expenses. Rule 37 mandates an award of expenses against a party who resists discovery unless it is determined that the failure was substantially unjustified. In this case the Court of Appeals ruled that the interlocutory appeals were not justified and dismissed those appeals. *Arthur Andersen & Co. v. Finesilver, supra.* Plaintiff was forced to oppose the interlocutory appeals to protect its discovery rights. Thus, these expenditures were necessarily made in pursuing plaintiff's discovery rights and are properly included in our award. In this instance, there are no other circumstances which would make an award of expenses unjust.

We are familiar with the extent and intensity to which this discovery issue has been litigated. We are also knowledgeable of the quality of legal services rendered by various counsel in this case. In light of our familiarity with this case and experience in awards of attorney fees in complex litigation *(e.g. In re King Resources Company*

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Securities Liti-

[8] Expenses incurred to July 23, 1976: Harry Hobson and Luke Danielson—$5,490; Miles Gersh—$10,970. Expenses incurred in connection with proceedings before the Tenth Circuit Court of Appeals: Luke Danielson—$3,360; Miles Gersh—$16,100; Harry Hobson—$6,930; Jane Talesnick—$707; Suzanne Queenan—$900. Expenses incurred in connection with proceedings before the United States Supreme Court: Luke Danielson—$1,600; Miles Gersh—$6,300; Harry Hobson—$3,150; Other associates and paralegals—$225; printing costs—$4,217. Total: $59,949.

gation, 420 F.Supp. 610 (D.Colo.1976) and *Oppenlander v. Standard Oil Co.,* 64 F.R.D. 597 (D.Colo.1974), we find the $59,949 to be a fair and reasonable expenditure. The reasonableness of the individual charges and fees is not contested by counsel for Andersen. Indeed, Andersen has represented that it expended over $71,000 since July 22, 1976, in resisting our orders. *Memorandum in Response to Plaintiff's Consolidated Statement of Expenses* at 4, filed March 21, 1977. Counsel for Andersen confirmed this figure at the April 15, 1977 hearing.

The costs which have been attendant to the delay in this case would prevent most litigants from having access to those documents to which they are entitled under Rules of Civil Procedure. While it is apparent that disparity in financial resources distorts the truth-seeking function in our judicial system, the court should not encourage that disparity by inaction in the face of abuse. The facts of this case compel us to award the State of Ohio the sum of $59,949 and assess this amount against Arthur Andersen & Company to compensate for the reasonable expenses incurred by Ohio in pursuing its discovery request. This award is made on the basis of both Federal Rules of Civil Procedure 37(a) and 37(b). We find that Andersen has both withheld documents to which Ohio was entitled and willfully and consciously violated court production orders.

It should be noted that the assessment of expenses and fees is not made for Andersen's failure to produce documents when such production would subject it to potential Swiss civil or criminal prosecution. Rather, the assessment is made for Andersen's unjustifiable resistance and delay in adherence to our discovery orders, which as the passage of time has demonstrated, was totally unwarranted. *See Advisory Committee Note to 1967 Proposed Amendments to Rule* 37. We also assess expenses because of Andersen's unreasonable opposition to Ohio's discovery requests. It is apparent that had Andersen been more assiduous in its responsibility in discovery, the documents could have been surrendered months if not years ago without any serious foreign law entanglements. Where as here we have found unjustifiable resistance and violation of court orders on discovery, Rule 37 leaves the court no choice but to impose costs and expenses.

In addition to reimbursement of expenses, Ohio has asked for the imposition of non-monetary sanctions. Specifically, we are requested to impose sanctions to the effect that the following facts shall be taken as established:

1. Both on and before April 10, 1970, Arthur Andersen & Co. possessed information relating to the financial condition and particularly the liquidity of FOF and subsidiaries which should have led Andersen to conclude that FOF and subsidiaries would imminently cease to purchase natural resource interests from KRC;

2. Both on and before April 24, 1970, Arthur Andersen & Co. knew that John M. King had committed KRC to provide financing to IOS and was negotiating an agreement to give KRC control of the operation of IOS.

Ohio also desires that the court assess a $100,000 fine against Andersen. *Plaintiff's Motion for Hearing,* filed January 19, 1977. Rule 37(b) permits the court to issue any sanction as is just for failure to comply with the court's order. In particular the rule permits the court to designate certain facts as established, refuse to allow the disobedient party to introduce designated matters into evidence, or the court may strike out pleadings or parts thereof. In addition, the court may impose the "ultimate sanction": entry of a default judgment against a disobedient defendant, or dismissal against a plaintiff.

Before imposing sanctions it must, of course, be established that Andersen was in possession, custody or control of the documents sought. *Norman v. Young,* 422 F.2d 470 (10th Cir. 1970). In this case, there is no viable question of possession, custody or control.

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The "ultimate sanction" of default cannot be administered absent some showing of willful failure to disclose. *Societe Internationale v. Brownell,* 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958); Note, *Standards for Imposition of Discovery Sanctions,* 27 Maine L.Rev. 247 (1975). Some courts have extended the willfulness criterion to any sanction under Rule 37(b). *Dorsey v. Academy Moving & Storage Co.,* 423 F.2d 858 (5th Cir. 1970); *Robison v. Transamerica Ins. Co.,* 368 F.2d 37 (10th Cir. 1966).[9] *And see* 8 C. Wright and A. Miller, *Federal Practice and Procedure* § 2289 (1970).

Although willfulness is not a prerequisite to every sanction under Rule 37, the Tenth Circuit standard for the determination of willful conduct was stated in *Robison, supra:* ". . . to be 'willful' the failure need not necessarily be accompanied by wrongful intent. It is sufficient if it is conscious or intentional, not accidental or involuntary . . .". 368 F.2d at 39. Here it can hardly be said that Andersen's unjustifiable resistance to discovery and the court's orders was the result of accident or involuntary action. The history of this case is replete with misrepresentations and contradictions by Andersen dealing with material discovery matters. These were not made by inadvertence on isolated occasions. Instead, Andersen repeatedly claimed that its allegations of the impossibility of compliance without Swiss law liability was the true state of affairs. While Andersen asserted good faith, it repeatedly distorted the true state

[9] *Robison* was decided before the 1970 amendments to Rule 37.

of its inaction to the court.[10] Regardless of the necessity of a finding of willfulness, it is clearly present in this case.

Sanctions imposed after the fact are often interpreted as punishment for non-compliance and hence, are in the nature of contempt which requires a due process procedure somewhat different from the hearing afforded here. However, as noted by the Third Circuit:

> Of course, all sanctions by their very nature involve an element of punishment. Their function is to encourage adherence to discovery procedures. Only where the sanction invoked is more stern than reasonably necessary does a denial of due process result.

DiGregorio v. First Rediscount Corp., 506 F.2d 781, 789 (3d Cir. 1974). More recently the Supreme Court approved of the "ultimate sanction" of dismissal and noted that its punitive aspects were overridden by the curative effects:

> . . . here as in other areas of the law, the most severe spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals [reversing the district court's dismissal] remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

[10] *E. g.,* see Andersen's representations made in opposition to Ohio's Motion for Sanctions discussed at Page 18, *supra.*

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643, 96 S.Ct. 2778, 2780-2781, 49 L.Ed.2d 747 (1976). (Emphasis in original).

We admonished Andersen to review the *National Hockey League* decision during our July, 1976 hearings. Unfortunately, Andersen seemed then, as before, more interested in delaying and resisting discovery than in complying in good faith with court orders.[11] It is inescapable that Andersen

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has followed a willful, deliberate and flagrant scheme of delay and resistance in discovery matters. In light of the opportunities to provide discovery of relevant documents, Andersen's opposition can only be characterized as contumacious and unjustified.

The choice of particular sanctions is a matter addressed to the sound discretion of the court. *Mangano v. American Radiator & Std. Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971). Within that discretion we utilize the formulation found in Rule 37(b)(2)(B). That section provides that the court may enter "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting [it] from introducing designated matters in evidence". Accordingly, we prohibit Arthur Andersen & Company from introducing any evidence concerning the information possessed by it relating to the financial condition of FOF which should have led it to conclude that FOF would cease to purchase natural resource interests from KRC. Further, we prohibit Andersen from introducing evidence concerning its knowledge that John M. King

[11] *E. g.*, see our discussion, *supra*, of Andersen's four month attempt to obtain waivers from the IOS liquidator. Andersen's prior inability to find an authorized person to sign a waiver was asserted despite the fact that Ohio had presented Andersen with the liquidator's consent in May, 1976.

committed KRC to provide financing to IOS and was negotiating an agreement to give KRC control of IOS.

It can reasonably be said that the material in the Geneva files would lead to information concerning these issues; it is to establish these issues that Ohio sought the documents; and thus, it is particularly appropriate to prohibit Andersen from introducing any evidence opposing those claims.

Such a sanction, in the context of this case, is clearly warranted. The court is given great flexibility in these matters and could simply have followed Ohio's suggestion and ruled certain issues as established. *Metropolitan Greetings, Inc. v. Michael McDonough, Inc.*, 60 F.R.D. 58 (E.D.Pa. 1973); *Krieger v. Texaco, Inc.*, 373 F.Supp. 108 (W.D.N.Y.1973). Or, under the facts we could have entered a default judgment. *Glezos v. Blackett*, unpublished, No. 76-1225 (10th Cir. Apr. 25, 1977); *Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia*, 543 F.2d 3 (2d Cir. 1976); *Local Union No. 251 v. Town Line Sand & Gravel, Inc.*, 511 F.2d 1198 (1st Cir. 1975); *Henry v. Sneiders*, 490 F.2d 315 (9th Cir. 1973), *cert. denied*, 419 U.S. 832, 95 S.Ct. 55, 42 L.Ed.2d 57; *Trans-World Airlines, Inc. v. Hughes*, 449 F.2d 51 (2d Cir. 1971); *rev'd on other grounds*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577; *Norman v. Young*, 422 F.2d 470 (10th Cir. 1970).

Sanctions need not always, of course, redound to the direct detriment of the client only. The court has the authority to impose sanctions directly against counsel under Rule 37. Also, under 28 U.S.C. § 1927, the court has authority to tax costs against counsel personally. In addition to the usual costs involved, the court can impose as costs expenses normally paid by the United States. See *Harrell v. Joffrion*, 73 F.R.D. 267 (W.D.La.1976).

The sanctions imposed are reasonable, necessary and warranted. Anything less would be a mockery of profes-

sional responsibility and of the tenor and spirit of the Federal Rules of Procedure. A lesser penalty would give license to financially able litigants to use court proceedings to hinder and delay litigation to the detriment of the integrity of the instant suit and to the orderly progress of other litigation as well.

ORDER

Defendant Arthur Andersen & Company is to pay to the State of Ohio, through its Colorado counsel, $59,949 as a reasonable reimbursement for costs and expenses. Such payment is to be made no later than June 20, 1977.

At the trial on the merits, defendant Arthur Andersen & Company shall not oppose or introduce any evidence opposing plaintiff State of Ohio's claims that:

1. Both on and before April 10, 1970, Arthur Andersen & Company possessed information relating to the financial condition and particularly the

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liquidity of FOF and subsidiaries which should have led Andersen to conclude that FOF and subsidiaries would imminently cease to purchase natural resource interests from KRC;

2. Both on and before April 24, 1970, Arthur Andersen & Company knew that John M. King had committed KRC to provide financing to IOS and was negotiating an agreement to give KRC control of the operation of IOS.

This memorandum opinion and order constitute our findings of fact and conclusions of law.

APPENDIX

The following is a partial listing of cases assigned to

this Judge as part of the King Resources Company Securities Litigation:

Dietrich v. King Resources Co., Civil No. C-3424; *Gross v. Blyth & Co.,* Civil No. C-3979; *Morrell v. King,* Civil No. C-3980; *Licker v. King Resources Co.,* Civil No. C-3981; *Hill v. Arthur Andersen & Co.,* Civil No. C-4485; *Pyle v. Arthur Andersen &* Co., Civil No. C-4486; *State of Ohio v. Crofters, Inc.,* Civil No. C-4628; *State of Ohio v. Boucher,* Civil No. 75-F-573; *First National Bank v. King,* Civil No. C-5045; *Arthur Andersen & Co. v. Boucher,* Civil No.74-F-18 (six cases are consolidated under this number); *Arthur Andersen & Co. v. Burke,* Civil No. 75-F-945; *Royal Resources Corp. v. American Employers' Ins. Co.,* Civil No. 74-F-1143; *Central National Bank v. King,* Civil No. C-5201; *Nelson v. King,* Civil No. 76-F-643; *State of Ohio v. Peterson,* Civil No. 76-F-992.

The litigation relating to King Resources Company has engendered the following published opinions:

Arthur Andersen & Company v. Finesilver, 546 F.2d 338 (10th Cir. 1976); *In the Matter of King,* 545 F.2d 700 (10th Cir. 1976); *American Employers Insurance Co. v. King Resources Co.,* 545 F.2d 1265 (10th Cir. 1976); *Bottger v. King Resources Co.,* 545 F.2d 1265 (10th Cir. 1976); *In the Matter of The Colorado Corp.,* 531 F.2d 463 (10th Cir. 1976); *In the Matter of King Resources Co.,* 528 F.2d 789 (10th Cir. 1976); *In re King Resources Co. Securities Litigation,* 525 F.2d 211 (10th Cir. 1975); *In re King v. Baer,* 482 F.2d 552 (10th Cir. 1973); *In re King Resources Co. Securities Litigation,* 420 F.Supp. 610 (D.Colo.1976); *In the Matter of King,* 424 F.Supp. 117 (D.Colo.1975); *S. E. C. v. Crofters,* 351 F.Supp. 236 (S.D.Ohio 1972); *In re King Resources Co. Securities Litigation,* 352 F.Supp. 975 (Jud.Pan.Mult.Lit.1972); *In re King Resources Co. Securities Litigation,* 352 F.Supp. 974 (Jud.Pan.Mult.Lit.

1972); *In re King Resources Co. Securities Litigation,* 342 F.Supp. 1179 (Jud.Pan.Mult.Lit.1972). *American Employers' Ins. Co. v King Resources Co.,* 556 F.2d 471 (10th Cir. 1977).

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1782

ARTHUR ANDERSEN & CO.,
Petitioner,

v.

STATE OF OHIO, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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July 14, 1978

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1782

ARTHUR ANDERSEN & CO.,
Petitioner

v.

STATE OF OHIO, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado is reported at 75 F.R.D. 12, and is printed in petitioner's Supplemental Appendix, S-17. The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 570 F.2d 1370, and is printed in petitioner's Supplemental Appendix, S-1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether a federal district court acts within its discretion under Federal Rule 37 when, after detailed consideration of a 3,000 page record, it imposes sanctions upon a party which has used "foreign law" as a diversionary

tactic to thwart lawful discovery orders while repeatedly misrepresenting its own conduct both to its opponent and to the federal court?

2. Whether a party which engages for at least 18 months in what the courts below found was a "willful and flagrant scheme of delay and resistance in discovery matters" may avoid sanctions provided by Rule 37 merely by yielding, months after a thrice-postponed discovery deadline, the material which it had been ordered to produce?

STATEMENT

At issue in this petition is an opinion and judgment of the United States Court of Appeals for the Tenth Circuit affirming an order entered by the United States District Court for the District of Colorado, imposing sanctions against petitioner Arthur Andersen & Co. ("Andersen") pursuant to Rule 37 of the Federal Rules of Civil Procedure. *State of Ohio* v. *Crofters, Inc.*, 75 F.R.D. 12 (D. Colo. 1977), *aff'd sub nom. State of Ohio* v. *Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir. 1978). The district court's 24-page order finds as a fact an 18-month pattern of willful, flagrant disobedience by Andersen of discovery requests and discovery orders, including intentional withholding of documents on grounds of Swiss secrecy when the documents were known by Andersen not to be secret, obstruction and delay of discovery in bad faith for purely tactical purposes, improper editing of documents prior to production, and repeated, deliberate and material misrepresentation to plaintiff State of Ohio ("Ohio") and to the federal district court. The order concludes:

> "We find willful and flagrant bad faith and a callous disregard of counsel's responsibilities . . . In sum, we find that (a) the materials sought by Ohio from Andersen were relevant to the issues in the suit; (b) Andersen had the ability to expeditiously comply with Ohio's discovery request; (c) a court order was entered directing Andersen to exert every effort to comply with the discovery requests; and (d) Andersen deliberately and willfully refused discovery for an unreasonable period of time without justification."

75 F.R.D. at 20.

Holding that Andersen's prolonged disobedience would fully justify entry of a default judgment, the court instead precludes Andersen from opposing at trial two of Ohio's factual contentions and directs Andersen to reimburse Ohio's reasonable expenses and attorney's fees incurred in obtaining compliance with the court's orders. 75 F.R.D. at 25.

Review of a district court's exercise of its discretion under Rule 37 depends significantly upon the particular facts which confronted that court. Although the circumstances leading to the court's imposition of sanctions are reviewed in the opinions below, the pertinent background is again summarized here because Andersen's petition is expressly premised upon assertions of "erroneous basic conclusions" by the district court and by the Tenth Circuit. (Petition, p. 10).

Ohio's Complaint in *State of Ohio* v. *Crofters Inc.*, et al., was filed on April 17, 1972. Ohio's allegations against Andersen relate to Ohio's purchase in the Spring of 1970 of $8,000,000 in securities of King Resources Company ("KRC"). The securities were never redeemed, and KRC subsequently filed a petition in bankruptcy.

More specifically, the Complaint alleges that in auditing the financial statements of KRC for 1968 and 1969, and in rendering an unqualified opinion that those statements constituted a fair financial presentation, Andersen fraudulently misrepresented the financial condition of KRC, in violation of the federal securities laws and of the statutory and common law of the State of Ohio. Ohio asserts that those financial statements, upon which it relied in purchasing the KRC securities, misrepresented KRC's finan-

cial position in that, among other things, they failed to disclose the extent of KRC's dependence upon a principal customer, failed to disclose that the customer was approaching financial collapse, that KRC had embarked on a costly and risky attempt to take control of and rescue the customer, and that the customer was The Fund of Funds, Ltd. ("FOF"), a nonresident offshore Canadian mutual fund controlled by Investors Overseas Services, Ltd. ("IOS"), another nonresident Canadian corporation.

FOF and IOS maintained their principal offices in or near Geneva, Switzerland. Both had been forbidden by a 1967 order of the Securities and Exchange Commission from doing business within the Commission's jurisdiction. Financial statements of both were audited by Andersen.

When, after a protracted stay, significant discovery in the lawsuit began in October of 1975, Ohio requested Andersen to produce documents pertaining to Andersen's audit services for IOS and to provide certain information concerning Andersen's knowledge of the IOS-KRC relationship during the period when Andersen was auditing the 1968 and 1969 KRC financials. These requests (the document request was later narrowed; the interrogatories were never changed) eventually became the basis for the district court's Rule 37 orders compelling discovery and, finally, for the sanctions now at issue.

In objecting to these discovery requests by Ohio in the Fall of 1975, Andersen raised the "foreign law issue," which soon became the theme of Andersen's prolonged opposition to discovery requests and discovery orders concerning information and material at its Geneva, Switzerland offices.

Throughout the ensuing controversy concerning what the parties usually referred to as the "Geneva documents," Andersen declared repeatedly and without qualification that if it were compelled to produce the requested documents or information this would violate the secrecy laws

of Switzerland and would subject the personnel of Andersen's Swiss offices to criminal and civil sanctions.

During the next seven months, from October of 1975 to April of 1976, the court monitored the controversy, and intervened where necessary, frequently emphasizing its concern that both Ohio and Andersen must present a proper factual foundation for all discovery motions.

In April of 1976, Ohio filed a motion relating specifically to the matter of discovery of documents and information in Andersen's Geneva offices concerning IOS and the relationship between IOS and KRC. Andersen objected to the motion, and attached to its opposition an opinion of its Geneva lawyers, which it had received about one month earlier, discussing various anti-disclosure prohibitions of Swiss law and describing penalties for their violation. The opinion did not address the applicability of any particular Swiss legal prohibition to any particular documents possessed by Andersen or sought by Ohio.

Upon receiving Andersen's opposition, Ohio immediately contacted several of the major entities whose consent would, according to the opinion of Andersen's Swiss lawyers, assist in effecting production of the Geneva documents. By May 20, 1976, one month after filing its motion to compel, Ohio had supplied to Andersen copies of the consents Ohio had obtained; Andersen replied only that the "purported" consents might well be invalid, and that the court could afford them no weight unless Andersen's Swiss lawyers assented. Andersen also told Ohio and the court that in any event these consents could "by no stretch of the imagination" protect Andersen from Swiss legal penalties and that "a *sine qua non* of such protection" would be the consents of both the Swiss Federal Prosecutor and the Geneva Prosecutor.

On May 26, 1976, the district court, declaring that it was "satisfied that the plaintiff has made a good showing for the discovery of these items in the Geneva office," granted Ohio's motion.

Three weeks passed. At the end of that time, during which Andersen produced none of the requested documents and none of the requested information, Andersen told the court that it had been "caught by surprise" by the court's order to produce the documents and that it would need more time to consider the "ramifications" of the order. Also, Andersen stated that it would have to determine the effect of what it had earlier called the "purported" consents furnished by Ohio, and to determine whether any of the Geneva documents could be made available to Ohio without violating Swiss law. To accomplish this, Andersen said, it would now need to find out what documents existed at its Geneva office, something it had never attempted to do during the months in which it had been declaring its inability to comply and its certain jeopardy under Swiss law. Andersen reported that one of its Denver counsel would be leaving that day, June 17, 1976, to consult with Andersen's lawyers in Switzerland, and to begin, *for the first time*, an examination of the documents in Geneva.

Responding to Andersen's claims of surprise, the district court directed Ohio and Andersen to meet together to try to agreee upon a modified procedure that would resolve the dispute. In two such meetings, Ohio proposed that Andersen enter into an agreed modified order that would require Andersen only to "exert every effort" to effect production of documents whose disclosure Andersen believed to be precluded by Swiss law. When Andersen flatly rejected this proposal, Ohio independently submitted such an order to the court. On July 2, 1976 the court withdrew its initial order and essentially adopted Ohio's proposal, an order that Andersen "exert every effort" to produce the Geneva documents. (The July 2, 1976 Order is printed below in Appendix A, p. 20.)

A week later, Andersen advised the court that its review of the documents in its Geneva office had revealed that there were only 220 documents which pertained to Ohio's requests and that, because of the consents earlier supplied

by Ohio, Andersen could produce in the week of July 12 what it had determined to be the "responsive portions" of 190 of those documents.

The week of July 12 passed. No documents were produced. No interrogatories were answered. Instead, Andersen delivered to Ohio a "protective order" to which it demanded Ohio's agreement before Andersen would produce what it referred to as the "redacted" documents, even though those documents concededly contained no Swiss "business secrets." (One such "redacted" document is reproduced below in Appendix B, p. 26.)

No documents were produced until July 22, 1976, when, three hours before a scheduled hearing on sanctions and seven weeks after the court had granted Ohio's motion to compel, Andersen delivered to the office of counsel for Ohio a list of 30 documents which it refused to produce, a five-page submission of partial answers to interrogatories, and 80 newspaper clippings. At the hearing that afternoon, counsel for Andersen conceded that the "protective order" which Andersen had insisted upon had in fact been unnecessary, and stated that the reason why Andersen had withheld until that morning documents which it knew to contain no business secrets was that counsel was "not focusing" on delay as a problem.

The court, nevertheless, imposed no sanctions; it indicated its extreme reluctance to do so, and stated it would take that matter under advisement. At a hearing the next morning, the court postponed for the third time, to August 20, 1976, the deadline for Andersen's compliance with Ohio's discovery requests. The court said that it was "not enamored" with Andersen's approach to Swiss law, and observed that it had been considering, but was withholding, the appointment of an expert on Swiss law to testify on this matter.

Andersen did not thereafter seek appointment of such an expert. Instead, it appealed to the United States Court of

Appeals for the Tenth Circuit from each of the district court's three orders relating to production of the Geneva documents.

In December of 1976, the Tenth Circuit upheld the challenged orders, observing that it was not impressed by Andersen's contentions with respect to alleged requirements of foreign law and international comity, and pointedly advising that if such a problem existed, "Andersen should call the matter to the attention of those officers and agencies of the United States charged with the conduct of foreign affairs, and they could make such representation to the Court as they deemed suitable. Andersen has not taken this action. Instead, it purports to speak for the United States." *Arthur Andersen & Co.* v. *Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976), *cert. denied sub nom*, *Arthur Andersen & Co.* v. *Ohio, et al.*, 429 U.S. 1096 (1977).

During a period of approximately eight months after the court's August 20 deadline, Ohio received from Andersen edited portions of documents previously produced by Andersen, as well as material originally included in Andersen's July 22 list of documents whose production, Andersen had then said, Swiss law prohibited without additional consents, including, as a "*sine qua non*," the consents of the Swiss Federal Prosecutor and the Geneva prosecutor. As it turned out, more than half of the 30 documents on the July 22 list were eventually produced by Andersen from places not affected by Swiss law, such as Andersen's own Chicago office.

On April 15, 1977, at a further hearing on the matter of sanctions, counsel for Andersen acknowledged for the first time that upon the advice of its Geneva lawyers Andersen had decided to "to take the risk" and had "stepped across the line in terms of Swiss law . . ." *i.e.*, it had produced documents without obtaining the consent of either the Swiss Federal Prosecutor or the Geneva Prosecutor. A description of its "efforts to produce" the Geneva documents, filed by Andersen under court order, showed that in fact Andersen had never attempted to obtain those consents.

On May 23, 1977 the federal district court, finding that "Andersen deliberately and willfully refused discovery for an unreasonable period of time without justification," imposed sanctions under Rule 37.

Declaring that this finding "has overwhelming support in the record," the Tenth Circuit affirmed the district court's decision. *State of Ohio* v. *Arthur Andersen & Co.*, 570 F.2d 1370, 1374 (10th Cir. 1978), *rehearing denied*, March 22, 1978.

ARGUMENT

I. ANDERSEN'S PETITION RESTS WHOLLY UPON RENEWED OBJECTIONS TO THE DISTRICT COURT'S FINDING OF ANDERSEN'S BAD FAITH, A FINDING WHICH THE CIRCUIT COURT UPHELD BASED ON "OVERWHELMING SUPPORT IN THE RECORD"

Part I of Andersen's petition rests upon assertions that the district court and the Tenth Circuit erred with respect to certain findings of fact concerning Andersen's disobedience, in bad faith, of lawful discovery orders:

> "To deny review because of erroneous basic conclusions would emasculate *Societé* [*Internationale* v. *Rogers*, 357 U.S. 197 (1958)] and would enable lower courts to evade review where the principles of *Societé* have been violated by arriving at unsupported conclusions."

(Andersen's Petition, p. 10).

Part II of the petition asserts constitutional error, but this argument, too, is expressly premised upon Andersen's contention that the trial court acted unfairly "in the circumstances of this case." (Andersen's Petition, p. 10). Both contentions, and the petition, fail when set alongside the record.

Addressing the ultimate question whether the trial court erred in finding bad faith on Andersen's part, the Tenth

Circuit held, following its review of a record of approximately 3,000 pages:

> "In its May 23, 1977 order, 75 F.R.D. at 20, the court found that 'Andersen deliberately and willfully refused discovery for an unreasonable period of time without justification.' *The finding has overwhelming support in the record.*" [Emphasis supplied].

570 F.2d at 1374.

Seeking to refute this finding of bad faith, Andersen once again offers its own interpretations and explanations of some of the district court's underlying findings of fact.

Andersen's specific arguments, set forth in Appendices B through F of its petition, were presented to the Tenth Circuit in almost identical wording in Andersen's petition for rehearing. With no member of the Court requesting a poll on the matter, the Tenth Circuit rejected the petition. (The Tenth Circuit's order denying rehearing is printed in Andersen's Supplemental Appendix, S-15.)

Review of three aspects of Andersen's bad faith, which it now tries once again to qualify and explain away, demonstrates that the "explanations" remain unsatisfactory:

1) *Andersen's principal objection to the court's discovery orders, the "foreign law problem," was in fact a part of Andersen's tactics of avoidance.*

Although repeatedly and often stridently asserting to Ohio and to the district court, from the Fall of 1975, its dire jeopardy under Swiss law should the court order production of documents from Andersen's Swiss offices, Andersen did not trouble to begin to determine what documents it maintained there until June 17, 1976, more than seven weeks after the court entered its order compelling discovery, and more than seven months after Andersen first asserted its jeopardy were it to produce the documents. The Tenth Circuit found it "incomprehensible and inexplicable how Andersen could make such representations

when it did not know what the documents contained . . ." 570 F.2d at 1373. Andersen does not deny the accuracy of the factual finding; rather, in Appendix C of its petition, it apparently maintains that because it believed that the district court would deny Ohio's motion to compel, on grounds of a previous discovery cutoff order, it had "no reason" to conduct a file search until it was actually compelled to produce the documents. By itself, this extraordinary argument refutes Andersen's protestations of its own good faith. The argument implies that when a party concludes that it can prevail in opposing certain discovery, the party may declare to its opponent and to a federal court, in unqualified terms, various grave consequences arising out of the production of documents which it has never even attempted to review. Upon this and other grounds, the Tenth Circuit properly found that "Andersen's claims with reference to Swiss law were no more than diversionary tactics." 570 F.2d at 1374.

2) *Andersen's defiance of discovery orders was accompanied by repeated distortion and misrepresentation of important facts.*

In May of 1976, Andersen told the district court, without condition or reservation, that:

> ". . . no amount of consents from private parties would suffice to protect Andersen's personnel from liability to criminal prosecution. *A sine qua non of such protection is the execution of consents or waivers by both the Swiss Federal Prosecutor and the appropriate Cantonal Prosecutors.*" [Emphasis added].

Almost a year later, in April of 1977, Andersen acknowledged that in fact it had been producing the "Geneva documents" without the consent of either the Swiss Federal Prosecutor or of any Cantonal Prosecutor, and that, indeed, it had thus "stepped across the line of Swiss law" upon the *advice* of its own Geneva lawyers. (Andersen's Petition, Appendix D, p. 47). It also finally became clear in

April of 1977 that despite its early insistence upon the absolute necessity for consents of the Swiss Federal and Cantonal Prosecutors, Andersen had never even tried to obtain those consents.

In its Appendix D, Andersen does not dispute any of these facts; instead, Andersen offers its third revised interpretation of them. What it now terms its earlier "reference to the Swiss Prosecutor" (*i.e.* its unconditional statement that the Swiss Prosecutor's consent was a *sine qua non* of Andersen's protection), was merely "an explanation of the Swiss law problems which Andersen believed it then faced." (Andersen's Petition, Appendix D, p. 40). "Upon further consultation with Swiss counsel," Andersen says, it decided that obtaining other required consents would make the risk of prosecution by Swiss officials "remote." (Andersen's Petition, Appendix D, pp. 40-41). Thus, Andersen now declares (this time in conflict with its own counsel's statement to the district court that Andersen had stepped across the line of Swiss law): "In no instance did Andersen produce to Ohio a document located in its office in Geneva, Switzerland without first having obtained the consent or consents required by Swiss law." (Andersen's Petition, Appendix D, p. 41).

Ohio would submit that this particular sequence of unqualified assertions followed by qualifications and revised qualifications tends only to underscore the correctness of the findings and conclusions reached by the courts below concerning Andersen's bad faith.

3) *Andersen's conduct throughout the discovery controversy was characterized by unnecessary delay.*

Not until three hours before a scheduled hearing on sanctions in the district court did Andersen yield one document or supply one item of information whose production had been requested by Ohio and compelled by the court. Among the previously withheld documents then produced by Andersen were 80 newspaper clippings. Andersen has never contended, nor could it, that there were any Swiss

business secrets in those newspaper clippings. Andersen quotes the representation of one of its counsel (Andersen's Petition, Appendix D, p. 47) that the newspaper clippings had to be examined for "notations." But, as the district court found, this excuse was contradicted by a document filed by another of Andersen's lawyers, the lawyer who finally reviewed the "Geneva documents," stating that document by document review of the newspaper clippings had never been necessary. 75 F.R.D. at 18, n. 4.

The strained "explanations" for damaging facts which Andersen offers here are no match for the record which Andersen *made* in the district court.

II. NO NOVEL OR BROADLY APPLICABLE QUESTION IS RAISED BY THE PARTICULAR SANCTIONS IMPOSED UPON ANDERSEN; THESE NECESSARILY DEPEND UPON THE FACTS OF THIS CASE AND ARE JUSTIFIED BY PRINCIPLES WHICH THIS COURT ESTABLISHED IN *SOCIETÉ INTERNATIONALE* v. *ROGERS* AND CONFIRMED IN THE *NATIONAL HOCKEY LEAGUE* CASE

In Part II of its petition, Andersen contends that "in the circumstances of this case," the district court's preclusion sanction denied Andersen due process because the sanction was allegedly entered "not for the purposes of compelling discovery (which had been fully made) or to redress prejudice (which was not established), but solely to punish the defendant and to set an example for others." (Petition, p. 10).

Three questions are implicit in this contention: Was the purpose of the sanctions imposed by the district court only to "punish" or make an example of Andersen? Was Andersen's conduct prejudicial? Was Andersen afforded due process?

Before addressing these questions, it must be noted that the doctrine for which Andersen here argues, as the courts below recognized, would defeat the fundamental purpose of

the Federal Rules "to secure the just, speedy and inexpensive determination of every action." Rule 1, Fed. R. Civ. P. For Rule 37 would be meaningless if an affluent party could defy discovery orders and misrepresent important facts, with the complete confidence that if it eventually "complied," it could buy its immunity from Rule 37 sanctions by, at worst, paying its opponent's attorney's fees. As the district court held:

> "The sanctions imposed are reasonable, necessary and warranted. Anything less would be a mockery of the tenor and spirit of the Federal Rules of Procedure. A lesser penalty would give license to financially able litigants to use court proceedings to hinder and delay litigation to the detriment of *the integrity of the instant suit* and to the orderly progress of other litigation as well." [Emphasis supplied].

75 F.R.D. at 25.

With respect to Andersen's contentions about the purposes of the particular sanctions imposed, the court's reference to "the integrity of the instant suit" is especially significant. The district court's order may have been intended in part to have a punitive effect upon Andersen and a monitory impact upon other litigants. But the court carefully emphasized that an important purpose of the sanctions was to deter *this party,* Arthur Andersen & Co., in order to protect the integrity of *this* ongoing lawsuit.

Thus the court held that it was "inescapable that Andersen has followed a willful, deliberate and flagrant scheme of delay and resistance in discovery matters." 75 F.R.D. at 25. One reason, the court pointed out, why a satisfactory pretrial order was not filed on July 22, 1976 was "because Andersen declined to stipulate to *any* facts as uncontroverted." [Emphasis by the court]. 75 F.R.D. at 17 n. The court noted that Andersen's tardy production of obviously nonprivileged newspaper clippings "is illustrative of its continued attempt to thwart timely discovery." 75 F.R.D.

at 18. The court also observed that as late as April 14, 1977, Andersen had produced several thousand pages of documents which were the subject of a stipulation of discovery entered in January of 1976, conduct not directly related to the "Geneva document" controversy, but "indicative of Andersen's response to the duties of good faith and cooperation imposed under the Federal Rules of Civil Procedure." 75 F.R.D. at 19, n. 5.

Nor does Andersen's assertion that its conduct resulted in no prejudice square with the facts. Expenditure not just of money but of time and attention caused by the need virtually to extract discovery from an unwilling party was prejudicial to Ohio in this case; as the district court held: "We find that the actions of Andersen were without good cause or substantial justification, have inordinately delayed resolution of this litigation, and have resulted in waste of time and unnecessary expense to the State of Ohio." 75 F.R.D. at 15. There was, moreover, prejudice to "other litigants in this case who have had (and continue) to bear the cost and aggravation of countless hearings and delays." 75 F.R.D. at 22. There was prejudice to "other cases delayed because of Andersen's conduct here." *Ibid.* And, not least, the Federal Rules and the judicial system were prejudiced by conduct which deliberately and unnecessarily challenged them both.

This Court has recently had occasion to stress the prejudice caused by defiance of court-ordered discovery. In *National Hockey League* v. *Metropolitan Hockey Club,* 427 U.S. 639 (1976), the trial court had entered the most severe sanction, dismissal, for "failure to timely answer written interrogatories." 427 U.S. at 639. This Court held that even assuming that the sanctioned party would comply with all future orders of that district court, "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts." 427 U.S. at 642-643.

In the circumstances of this case, Andersen's vague "due

process'' assertions are without merit. Mr. Justice Harlan's discussion of due process limitations on Rule 37 sanctions in *Societé Internationale* v. *Rogers,* 357 U.S. 197 (1958), was in the context of a dismissal sanction, imposed upon a party who had unquestionably made a good faith effort to comply with a court order. In *Societé*, moreover, a "foreign law" question was at least demonstrable. The Swiss Federal Prosecutor had officially confiscated thousands of the discovered party's documents. In the present case no Swiss official has ever expressed the slightest interest in any of the documents sought by Ohio in any phase of the discovery controversy.

Two hearings on sanctions were conducted by the trial court, in July of 1976 and in April of 1977. 570 F.2d at 1373, 1374. In *Societé* Mr. Justice Harlan declared that "[Rule 37] allows a court all the flexibility it might need in framing an order appropriate to a particular situation . . . the willfulness, or good faith of [the discovered party] can hardly affect the fact of noncompliance and are relevant only to the path which the District Court may follow in dealing with [the party's] failure to comply." 357 U.S. at 208. Here, the district court carefully weighed all such factors and, finding that entry of default judgment would be appropriate, nevertheless chose an even more moderate path than would have been justified by Andersen's disobedience.

III. NO CONFLICT AMONG CIRCUITS IS PRESENTED BY THE CASES ANDERSEN CITES; INDEED, THOSE CASES ARE IRRELEVANT HERE, AND OTHERS WHICH ANDERSEN DOES NOT MENTION STRONGLY SUPPORT THE OPINIONS BELOW

Andersen cites five Second Circuit cases (Petition, p. 6), which it says conflict with the opinions below and require a different result. In fact, only one of those cases, *United States* v. *First National City Bank,* 396 F.2d 897 (2d Cir. 1968), even addresses the matter of Rule 37 sanctions. In

that case, the Second Circuit firmly upholds a civil contempt sanction against a New York bank which failed to comply with a subpoena for production of documents possessed by its branch in Germany. The opinion underscores the trial court's finding of bad faith on the part of the New York bank for failure to examine the records whose production it resisted.

Andersen cites these Second Circuit cases in connection with its assertion that due process requirements were disregarded because the district court's orders allegedly compelled production of documents "without regard to whether such production would violate Swiss law, and then severely sanctioned Andersen for non-compliance with the deadline imposed." (Petition, p. 7). But the district court never indicated disregard of legitimate foreign law considerations; on the contrary, as pointed out above, it suggested, to cite one example, the appointment of an expert on the matter of Swiss law, a suggestion to which Andersen never responded. Nor, certainly, did it sanction Andersen for not producing documents protected by Swiss law. The court specifically identified the discovery order upon which its sanctions were based—"a court order was entered directing Andersen to exert every effort to comply with the discovery requests, and . . . Andersen deliberately and willfully refused discovery for an unreasonable period of time without justification." 75 F.R.D. at 20. Similarly, the court stressed that "the assessment of expenses and fees is not made for Andersen's failure to produce documents when such production would subject it to potential Swiss civil or criminal prosecution. Rather, the assessment is made for Andersen's unjustifiable resistance and delay in adherence to our discovery orders, which, as the passage of time has demonstrated, was totally unwarranted." 75 F.R.D. at 23.

Andersen concludes its petition by asserting that this case should be reviewed in order to "eliminate uncertainty in the wake of *National Hockey League.*" (Petition, p. 15). Although referring generally to "numerous cases" which

have "grappled" with "these questions," Andersen cites no case which indicates any such uncertainty. A predictable reason for this failure may be that no case in fact offers support for the proposition that bad faith violation of court orders must be excused as long as documents are produced at some point. Such contentions have been consistently rejected by federal appellate and district courts.

For example, ten years before *National Hockey League,* in *Diapulse Corp. of America* v. *Curtis Publishing Co.,* 374 F.2d 442, 446 (2d Cir. 1967), the United States Court of Appeals for the Second Circuit upheld the trial court's dismissal of a complaint when requested documents had been tendered for inspection twenty days late. More recently, in *Margoles* v. *Alida Johns and The Journal Company,* unpublished, No. 76-1293, (7th Cir., October 14, 1976), the United States Court of Appeals for the Seventh Circuit affirmed a dismissal of a complaint where, even though a request for production of documents was eventually complied with, "compliance" did not occur until two months after a court-ordered deadline. The Seventh Circuit upheld the dismissal upon the ground that the district court's finding of willful failure was supportable on the record.

In *Perry* v. *Golub,* 74 F.R.D. 360 (N.D. Ala. 1976), the federal district court entered a default judgment against defendants for failure to produce documents in compliance with a court-ordered deadline, despite the fact that at the hearing on sanctions the defendants offered to produce the material. The court observed, "The defendants' eleventh hour offer does not alter the fact that they willfully refused to comply with the court's order." 74 F.R.D. at 365.

Thus, with respect to the important principles underlying the application of Rule 37 sanctions to conduct such as that involved in this case, conduct reflecting "flagrant bad faith," this case creates no conflict among circuits and illustrates no uncertainty. In such circumstances, as shown in the cases cited above, the federal courts have recognized that even the most severe sanction may be appropriate. In

this particular case, Ohio would submit, no question meriting review is presented by this district court's careful and measured response to the attempts of a party to exploit the flexibility of the Federal Rules and the patience and tolerance of the federal court.

CONCLUSION

For these reasons it is respectfully submitted that the petition should be denied.

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July 14, 1978

APPENDIX A

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, JULY 2, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
M.D.L. DOCKET NO. MDL 79-1

Civil Action No. C-4628

IN RE: KING RESOURCES COMPANY SECURITIES LITIGATION STATE OF OHIO, Plaintiff, vs. CROFTERS, INC., *et al.*, Defendants.	ORDER 1976-9 ORDER RE PENDING DISCOVERY DISPUTES

THIS MATTER comes before the Court for additional orders on pending discovery matters. The Court, having considered the briefs and statements of counsel and the proposed orders tendered therewith, enters the following orders:

ORDERED — This Court's Order, dated May 27, 1976, which stated: "3) Motion for discovery of certain documents of Andersen & Co. is granted . . ." is hereby withdrawn, and with respect to the discovery sought by plaintiff, Andersen shall proceed in the following manner:

A. *Discovery Sought*:

1. Produce for Inspection and Copying by the Plaintiff State of Ohio the Following:

   (a) Reports of examinations, draft reports, working papers, correspondence and news clipping files in the Geneva office of Arthur Andersen & Co., if any, which reflect the decreasing cash flow and liquidity of IOS, Ltd., Fund of Funds, Ltd. (including its subsidiary F.O.F. Proprietary Funds, Ltd.) during the period from September 1, 1969 through May 31, 1970.

2. Answer The Following Interrogatories Propounded By The Plaintiff State of Ohio And Produce For Inspection And Copying By Ohio The Documents Identified In The Answers To The Questions:

   (a) Did the Geneva office of Arthur Andersen & Co. at any time learn of agreements, negotiations, or any proposed agreements or negotiations to the effect that John M. King, KRC, or the Colorado Corporation, alone or in combination, through loans, stock purchases, or in any other manner, proposed to obtain control, ownership, or partial ownership or control of IOS, Ltd.?

   (b) If the answer to (a) above is other than an unqalified negative:

      (1) On what date did the Geneva office of Arthur Andersen & Co. first learn of such a proposal?

      (2) Please identify the person or persons from whom the Geneva office of Arthur Andersen & Co. first learned of of such a proposal.

(3) Please identify the partners, employees, or other persons associated with the Geneva office of Arthur Andersen & Co. who were the first to learn of such a proposal.

(4) Please identify (and produce for inspection and copying) any and all documents from the Geneva office of Arthur Andersen & Co. reflecting when that office first had knowledge of such a proposal.

(5) What was the nature of any such proposal at the time the Geneva office of Arthur Andersen & Co. first became aware of it?

(6) Did the nature of such proposal change over time?

(7) If the answer to the preceding question is other than an unqualified negative, how did the nature of the proposal change?

(c) If the answer to (a) above is other than an unqualified negative, what audit procedures or other investigatory steps did you use with respect to or in contemplation of such proposal?

(d) With regard to the answer to (c) above:

(1) Please identify (and produce for inspection and copying) all documents from the Geneva office of Arthur Andersen & Co., including, without limitation, books, manuals, or memoranda which treat generally the subject of audit responsibilities, necessary or advisable procedures, investigatory

steps to be taken, or subjects likely to be of concern in conducting audits of enterprises which are contemplating or have entered negotiations with respect to such proposals.

(2) Please identify (and produce for inspection and copying) every document from the Geneva office of Arthur Andersen & Co. relating to audit procedures or other investigatory steps taken by that office with respect to such proposal.

(3) Please identify each partner or employee of the Geneva office of Arthur Andersen & Co. who participated in audit procedures or other investigatory steps with respect to or related to such proposal.

(4) Please identify all individuals at KRC, Investors Overseas Services, or affiliated entities who were contacted by the Geneva office of Arthur Andersen & Co. in the course of employing audit procedures or other investigatory steps with respect to such proposal.

B. *Procedure to Be Followed by Arthur Andersen & Co.*

1. Cause to be concluded the search presently being conducted of the files of Arthur Andersen & Co. located at Geneva, Switzerland that may contain documents responsive to the above request for production of documents and answers to the above interrogatories, and segregate such documents.

2. On or before July 12, 1976, produce to plaintiff for inspection and copying at any of Andersen's offices

in the United States, the documents and information requested. *However,* with respect to any documents or information the release of which defendant believes would subject it to civil or criminal liability under Swiss law, defendant shall, by July 12, 1976:

(i) Exert every effort to obtain the release of such documents or information, through obtaining consents or waivers which may be necessary to comply with this Order and with Swiss law;

(ii) Identify any document (by type of document, subject and title of document, author, addressee, date) or information (by subject matter and source) which has not been produced; state with specificity the grounds including what efforts have been made to effect production, and what efforts are planned to be made.

(iii) Deliver to the Court all documents identified in (ii) above, organized and catalogued in such form that if this Court determines that some or all of such documents must be produced, based on this Court's evaluation both of the reasons given by Andersen for non-production and of efforts exerted by Andersen to effect production, any such documents may be made available without further delay for inspection and copying by plaintiff State of Ohio.

3. On or before July 16, 1976, counsel for Ohio and Arthur Andersen are directed to meet in an effort to resolve differences respecting any documents or data which have not by that date been produced by Arthur Andersen. Only upon conclusion of such meeting may the parties take such further steps as may be appropriate under the federal rules.

• • •

IT IS FURTHER ORDERED that there will be no interlocutory appeals from discovery orders in this case and the Court will summarily deny applications for same. *Paramount Film Distributing Corp. v. Ritter,* 333 F.2d 358 (10th Cir. 1964); *see also Denson v. Brown,* No. 74-8075 (10th Cir., July 29, 1974 (Appendix No. 13) (Unpublished Opinion).

FURTHER, the Court expressly orders that if, upon *in camera* inspection of the documents subject to claims of attorney-client or foreign law privilege, it appears that such claims were made frivolously or without good faith, the Court will impose sanctions.

DATED at Denver, Colorado, this 2 day of July, 1976.

BY THE COURT:

/s/ Sherman G. Finesilver
SHERMAN G. FINESILVER, Judge
United States District Court

APPENDIX B

ONE OF DOCUMENTS EDITED BY ANDERSEN BEFORE PRODUCTION TO OHIO, PRODUCED ON AUGUST 13, 1976

Remarks concerning I.O.S., Ltd. ANQ 12-31-69

1976-12

(21)

Comments concerning discussions with officers -

Finally, we had discussions with John King and his representatives.

1976-12

Supreme Court, U. S.
FILED
JUL 29 1978
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1977

No. 77-1782

ARTHUR ANDERSEN & CO.,
Petitioner,

v.

STATE OF OHIO, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI

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REPLY BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI

Petitioner Arthur Andersen & Co. ("Andersen") submits this Reply Brief in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Petition") and in response to arguments in opposition to the granting of the Petition raised by Respondent State of Ohio ("Ohio"), in the Brief For Respondent In Opposition, served on July 14, 1978 ("Ohio's Brief").

I

Andersen's petition does not rest, as Ohio asserts, upon the errors of fact made by the district court and the Tenth Circuit. Rather, Andersen's position is that review of the denial of due process to Andersen and the other serious errors of law by the district court and the Tenth Circuit

should not be precluded because of basic erroneous conclusions made without support in the record and contrary to the unequivocal facts of record, which were used as a basis for attempting to distinguish this case from *Societe Internationale v. Rogers,* 357 U.S. 197 (1958).

Ohio implicitly concedes (Ohio's Brief, pp. 5-7) that both the district court and the Tenth Circuit erred in concluding that Andersen had violated the district court's order of December 16, 1975 and had been in violation for 18 months, which was basic to the finding of bad faith both by the district court and the Tenth Circuit. (Andersen's Petition, p. 9 and Appendix B thereto, pp. 25-29 and Supplemental Appendix to Petition, pp. S-18, S-20, S-22, S-28, and specifically at S-29).

Nor does Ohio contend, as both the district court and the Tenth Circuit erroneously concluded (Andersen's Petition, p. 9 and Appendix E thereto, pp. 52-62 and Supplemental Appendix to Petition, pp. S-6, S-21, S-27, S-28, and S-40 n. 11) that Ohio had delivered to Andersen the consent of I.O.S. Ltd. in May, 1976 (Ohio's Brief, p. 5).

These egregious errors and the other errors set forth on page 9 of Andersen's Petition and in the Appendices there cited were basic to the findings on which Ohio seeks to distinguish *Societe* and avoid a review by this Court of whether Andersen has been denied due process of law in violation of the Constitution of the United States or unlawfully punished.

Andersen's position with respect to the first of the two questions presented in its Petition is that the unique difficulties created by a foreign law/domestic law impasse (exemplified by the discovery dispute here) raise due process concerns which are not present in the typical pretrial domestic discovery dispute but which were present here and which, as a matter of law, were improperly resolved by the lower courts' decisions.

Under *Societe Internationale v. Rogers,* 357 U.S. 197 (1958), and the decisions of the Court of Appeals for the Second Circuit cited in Andersen's petition (p. 6), it is clear that, in a case in which prohibitions of foreign law impact upon the resolution of pretrial discovery disputes, due process requires: (1) that the foreign law problem be recognized and that full consideration be given to the foreign legal obstacles which confront the discovered party; and (2) that, if the domestic court determines that discovery must be made despite the foreign law prohibitions, the discovered party's obligation to comply with the court's order must be structured in a fashion permitting the party full opportunity to resolve the impasse before it faces the penalty of sanctions imposed for reasons beyond its control. These principles find express recognition in the *Restatement (Second) of the Foreign Relations Law of the United States (1965),* §§ 39-40, which urges domestic courts confronted with this type of problem to "minimize conflicts" and to "moderate the exercise of [their] enforcement jurisdiction."

Andersen's position is that the district court and the Tenth Circuit repudiated these previously uniformly recognized principles of law and that the review of their actions should not be precluded by their unsupported conclusions which are contrary to the uncontradicted record.

That the district court peremptorily ordered discovery from Geneva, Switzerland in disregard of a foreign law problem which presented obstacles to the discovery beyond Andersen's control is clearly established in the record.

At a hearing held on July 23, 1976, after Andersen had filed with the district court a detailed list of the documents which it could not then produce because it had not yet been able to obtain consents from third parties required by Swiss criminal and civil law, and after Andersen had explained to the court the Swiss legal problems it was facing and what it was doing to overcome them, the court entered the follow-

ing oral order which superseded its prior orders, including the July 2, 1976 order set forth as Appendix A to Ohio's Brief:

> "Now I want it clearly understood that the 19th of August is the cutoff date. The cutoff date is tonight for documents that you can get by tonight, but *in any event, with or without consents,* the Court wants full compliance by the 20th of August [1976] on these 20 or 25 documents . . ." (Emphasis added).

"[I]n any event, with or without consents" — having received the detailed opinion of Andersen's Swiss counsel explaining the applicable provisions of Swiss law, an affidavit of Andersen's American counsel describing his review with Swiss counsel of the documents in question and the advice received from Swiss counsel, and an explanation by Andersen of the work it had done and was doing to obtain the required consents or otherwise to comply with Swiss criminal and civil law, and having received no contradictory presentation by Ohio as to any aspect of Swiss law (for that matter, having received no presentation of any kind by Ohio respecting foreign law), the district court swept aside the entire foreign law issue and directed Andersen to produce, whether or not that production would violate Swiss law.*

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*In its Brief Ohio disregards the district court's order of July 23, 1976 and offers, as "proof" of a contention that the district court had *not* disregarded the foreign law problem, an *ipse dixit* recited by the district court ten months later in its order imposing sanctions:

> " '[T]he assessment of expenses and fees is not made for Andersen's failure to produce documents when such production would subject it to potential Swiss civil or criminal prosecution. Rather, the assessment is made for Andersen's unjustifiable resistance and delay in adherence to our discovery orders, which, as the passage of time has demonstrated, was totally unwarranted.' 75 F.R.D. at 23." (Ohio's Brief, p. 17).

Not only did the district court flatly order Andersen to produce documents from Switzerland "with or without consents" required in order for Andersen to avoid violating both the Swiss criminal and civil law, the district court also never undertook any analysis of Swiss law nor reached any conclusion as to the impact of Swiss law on the discovery dispute. Ohio disingenuously suggests that Andersen had a duty to respond to a comment by the district court that it was considering appointing an expert on Swiss law to advise it. The district court decided not to do so. Andersen had put into evidence the uncontradicted opinion of its Swiss counsel and had no reason to respond to the district court's comment. If anyone should have responded to such a comment, it should have been Ohio — not Andersen — as Ohio had produced nothing in respect of Swiss law.

The Tenth Circuit's affirmance of the district court's imposition of sanctions — an imposition made in the absence of any determination of how foreign law applied and impacted upon the discovery ordered — raises compelling questions of due process and conflicts sharply with this Court's decision in *Societe* and the decisions of the Court

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But what the district court *said* in its May 1977 decision cannot erase, and is squarely at odds with, what it had *done* the summer before. Moreover, the passage of time referred to by the district court was *not* measured by it from its order of May 27, 1976, which first ordered the production of the documents from Geneva, Switzerland without specifying any deadline, or from August 20, 1976, the deadline fixed by the district court, but was erroneously measured as 18 months from the date of its order of December 16, 1975 which did not order discovery of the documents in Geneva, Switzerland. (See p. 2 hereof.)

of Appeals for the Second Circuit cited in Andersen's Petition (p. 6).*

The conflict between the decisions of which review is here sought and the cited decisions of the Court of Appeals for the Second Circuit is no less real because, as Ohio seems to suggest (Brief, pp. 16-17), in most of the cited decisions the foreign law problem was dealt with at a stage in the litigation preceding a request for the imposition of sanctions, whereas the decisions of which review is here sought involved the imposition of sanctions. If anything, the fact that other courts gave far more meaningful consideration to the "foreign law" problem at a less serious stage of the litigation of the issue than the consideration given to the problem by the district court here — at a *more serious* stage — supports, rather than diminishes, Andersen's due process claim.

The pretrial imposition of sanctions, in the context of a foreign law discovery dispute, violated due process principles established by this Court in *Societe, supra.* The undisputed facts of record here are that despite Andersen's obtaining of all of the consents required by Swiss law and its full production of all ordered discovery before *even the scheduling* of a trial date, Andersen was sanctioned (by a preclusion

*See *Trade Development Bank v. Continental Insurance Co.*, 469 F.2d 35 (2d Cir. 1972) (district court decided substantive issues of Swiss banking secrecy law and directed that the discovered party need not make the disclosures sought; circuit court reviewed Swiss legal question *de novo* and affirmed); *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968) (district court determined substantive issues of German law and directed party to comply with a grand jury subpoena, on the ground that it had shown, not that compliance would subject it to criminal sanctions or their equivalent under German law, but only that there was a "remote and speculative possibility" that it might incur civil liability; circuit court reviewed German legal issues and affirmed); *Application of Chase Manhattan Bank*, 297 F.2d 149 (2d Cir. 1960) (district court determined substantive issue of Panamanian law and directed that party would not be required to produce documents from Panama in response to a grand jury subpoena; circuit court affirmed); *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960) (district court refused to quash subpoenas requiring production of documents from Canada; circuit court modified order, noting but not resolving conflict of theories between Canadian counsel as to Canadian law, and held that production of documents from Canada would not be ordered and that, to seek such documents, subpoenaing party should proceed via letters rogatory so Canadian law issues could be resolved by Canadian court); *First National City Bank v. Internal Revenue Service*, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960) (district court modified IRS summons to exclude production of documents from Panama; circuit court analyzed Panamanian legal issue and reversed on ground that, while production in violation of Panamanian law should not be ordered, discovered party had not shown that Panamanian law actually forbade disclosure).

order which will affect its rights to fully contest its adversary's claims at trial) for conduct related to its production from abroad. In startling contrast, this Court in *Societe* indicated that petitioner's failure to comply there with an order directing discovery from abroad possibly could be sanctioned, *if at all,* only upon trial of the case. Indeed, that the holding in *Societe* manifested this Court's view that important due process concerns invariably are raised in the foreign law discovery area, even seems to be conceded by Ohio (Brief, p. 17). But rather than answer these concerns Ohio seemingly asserts that in this case, allegedly unlike *Societe* where the " 'foreign law' question was at least demonstrable" (Ohio's Brief, p. 16), questions of due process become irrelevant because,

> "no Swiss official has ever expressed the slightest interest in any of the documents sought by Ohio in any phase of the discovery controversy." (*Ibid.*)

The point is meritless, except to demonstrate that Andersen was warranted in concluding that the risk of criminal prosecution for disclosures of the business secrets of others was remote once it had obtained, from all those who could have filed a criminal complaint against it for unauthorized disclosure, their written consents to such disclosure, and that

Switzerland had no separate state interest to vindicate; and that Andersen's decision to produce the documents from Geneva, Switzerland with those consents in hand was *not* an abandonment of its Swiss law contention, as the lower courts erroneously concluded. Until Andersen obtained such consents, at a cost to it in excess of $71,000, it had a legitimate "fear of criminal prosecution," which this Court in *Societe, supra,* 357 U.S. at 211, stated "constitutes a weighty excuse for non-production."

The lower courts' treatment of the foreign law problem with which they were presented constituted a drastic departure from the principles of law established by all relevant precedent and resulted in unfair and unconstitutional punishment of a civil-litigant-defendant for delays in the making of discovery beyond its control.

II

The second question presented by Andersen in its Petition concerns the proper functions of the federal discovery sanctions rule, Rule 37, F.R. Civ. P., and what, if any, constitutional constraints must limit a court's exercise of power under that rule in light of this Court's decision in *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639 (1976).

Before *National Hockey League* the uniformly accepted construction of Rule 37 was that any sanctions imposed under the rule must in some rational way be related to, and justified by, the effectuation of the discovery process in a particular case. (See, *e.g.,* cases cited in Petition, pp. 10-11, and also, *e.g., Trans World Airlines, Inc. v. Hughes,* 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds,* 409 U.S. 363 (1973); *Metropolitan Greetings, Inc. v. Michael McDonough, Inc.,* 60 F.R.D. 58 (E. D. Pa. (1973)). That the imposition of "discovery" sanctions, to be valid and proper, must be for the purposes of fulfilling and furthering the discovery process and not for purposes of imposing punishment was first stated by this Court in *Hammond Packing Co. v. Arkansas,* 212 U.S. 322 (1909), and later found explicit recognition in *Societe, supra,* 357 U.S. at 209, 210, and was expressly cited, as well, by the drafters of Rule 37. See Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule 37, p. 225.

In Andersen's view this Court's decision in *National Hockey League* did not signal a departure from this earlier teaching. But the lower courts in this case, in the decisions of which review is here sought, concluded that *National Hockey League did* signal such a departure and held that this Court has established, as a new principle, that discovery sanctions are to be imposed as punishment and for their putative deterrent effect. Legal commentary, also, has opined that *National Hockey League* stands for such new and far-reaching principles. "The Emerging Deterrence Orientation In The Imposition Of Discovery Sanctions," 91 Harvard L. Rev. 1032, 1038-1040 (1978). And numerous cases decided since *National Hockey League* reflect both an uncertainty regarding that decision and the potentially far-reaching and unsettling impact upon sanctions proceedings of the Court's decision in that case.*

The instant case — presenting as it does a clear-cut situation in which ordered discovery was fully made, no substantive prejudice was established, but severe sanctions

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*Ohio (Brief, pp. 17-18) faults Andersen for not having discussed in its Petition any specific cases decided since *National Hockey League* which reflect what Andersen claims is the uncertainty as to the proper role of Rule 37 left in the wake of *National Hockey League.*

The fact that *National Hockey League* may have a potentially monumental impact upon future federal civil litigation is so clear, however, as to render unnecessary a detailed analysis of the cases already decided by the Courts of Appeals since *National Hockey League.* The following cases exemplify the problem. *Dellums v. Powell,* 566 F.2d 231, 235 (D.C. Cir. 1977) (the court referring to *National Hockey League* as adding a "further consideration" —a "prophylactic" one—to be accounted for in determining the propriety *vel non* of discovery sanctions, and appearing to say

were imposed for deterrent purposes — presents an opportunity for this Court to further address the important federal procedural questions referred to in *National Hockey League* and to establish firm principles which will avoid conflicting decisions as to the application of Rule 37 in the future.

In response to Andersen's contention, Ohio appears to quarrel with the assertion that the question presented here is a question of law, stating, for example, that the propriety of the imposition of sanctions upon Andersen "necessarily depend[s] upon the facts of this case . . . ." (Ohio's Brief, p. 13). Ohio then seems to contend that, while Andersen may have made all ordered discovery, its delay in production *did* "prejudice" Ohio (*id.*, p. 15), and that sanctions were imposed for reasons other than "punishment" of Andersen.

These claims, however, are exercises in semantics which miss, or beg, the point. For example, Ohio's argument that Andersen's alleged delay in discovery did result in "prejudice" is stated as follows:

> "Expenditure not just of money but of time and attention caused by the need virtually to extract discovery from an unwilling party was prejudicial to Ohio in this case . . . ." (Ohio's Brief, p. 15).

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that, under *National Hockey League*, the "prophylactic" consideration alone will support a dismissal of claims); *Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 236 (8th Cir. 1977) (the court seemingly holding that a finding of prejudice resulting from a charged failure of discovery still remains a necessary predicate for the imposition of sanctions); *Affanato v. Merrill Bros.*, 547 F.2d 138 (2d Cir. 1976) (the court quoting extensively from *National Hockey League* and affirming, without discussion of whether there had been prejudice, entry of a default judgment for failure to make discovery); *Emerick v. Fenick Industries*, 539 F.2d 1379 (5th Cir. 1976) (the court quoting from *National Hockey League* and affirming, without discussion of whether there had been prejudice, the striking of a defendant's answer for failure to make discovery).

Without gainsaying the fact that Ohio's counsel expended time and energy in litigating the discovery issues in dispute, it remains clear that this alleged form of "prejudice" is not that which has been traditionally required as the reasoned and constitutional basis for an imposition of a preclusionary sanction — this "prejudice" is not substantive prejudice hampering a party's trial of its case on the merits because of its adversary's failure to make discovery, see *Societe, supra; Hammond Packing Co., supra.**

Similarly without merit are Ohio's recitations to the effect that the district court allegedly did not punish Andersen but, in imposing sanctions, did something else and something permissible. Thus, Ohio emphasizes the district court's statements that sanctions were imposed for purposes of maintaining " 'the integrity of the instant suit' " (Ohio's Brief, p. 14), that Andersen's alleged conduct respecting two matters unrelated to the Geneva documents dispute was " 'indicative of Andersen's response to the duties of good faith' " (*id.*, pp. 14-15), and that Andersen's sanc-

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*The nature of the "prejudice" required to support the imposition of sanctions is that described in this Court's seminal statement in *Hammond*:

> "The essential basis for the exercise of power, and not a mere incidental result, arising from its exertion, is the criterion by which its validity is to be measured. Hovey v. Elliott involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. *In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure*

tioned conduct allegedly had "prejudiced" litigants in other cases (*id.*, p. 15). But these are simply different ways of stating that Andersen was sanctioned, *not* for a failure of discovery which operated to the prejudice of its adversary in this case, but rather for assorted acts of "bad faith" and as an example to others. No matter how the district court characterized the action it was taking, the principal effect and purpose of the action was to "punish" Andersen — which courts have held is not the purpose to be served by the imposition of Rule 37 sanctions.

Apart from the above contentions, Ohio's response to Andersen's due process claim is to re-state it (wrongly) and then claim that the principle of law which Andersen advances *never* has been, and should not be, the law. Apparently Ohio reads *Societe* as recognizing "due process" concerns in the discovery context only when the sanction imposed has been the sanction of dismissal or default judgment and, even then, only if the trial court has found "good faith" on the part of the sanctioned party:

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to produce. The difference between mere punishment, as illustrated in Hovey v. Elliott, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in one and to apply and enforce in the other. In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode described by law." (212 U.S. at 350-351; emphasis added).

> "Mr. Justice Harlan's discussion of due process limitations on Rule 37 sanctions in *Societe Internationale v. Rogers,* 357 U.S. 197 (1958), was in the context of a dismissal sanction, imposed upon a party who had unquestionably made a good faith effort to comply with a court order." (Ohio's Brief, p. 16).

But there is no logic or sense in insisting that trial courts adhere to constitutional safeguards only if they are bent upon imposing the "most severe" sanction, but leaving them free to disregard constitutional principles if they "merely" enter "preclusion" orders and assess fines. Ohio's related thesis that the district court need not concern itself with following a regime of reasoned order and due process once it pronounces a finding of "bad faith", is equally illogical and unfair. The dangers of permitting a trial court, simply on the basis of a finding of "bad faith", to ignore the procedural framework established in *Hammond* and re-affirmed in *Societe* are manifest.*

Finally, Ohio builds upon its erroneous restatement of Andersen's position a faulty *in terrorem* argument:

> "Before addressing these questions, it must be noted that the doctrine for which Andersen here argues,

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*The cases cited by Ohio (Brief, p. 18) in support of its argument do not in any way contravene Andersen's position as to the principles established by *Hammond* and *Societe*. Ohio says that in *Diapulse Corp. v. Curtis Pub. Co.*, 374 F.2d 442 (2d Cir. 1967), the Second Circuit "upheld the trial court's dismissal of a complaint when requested documents had been tendered for inspection twenty days late." (*Ibid.*). But, the crucial fact in *Diapulse* which led to dismissal was not that documents had been tendered late, but that the plaintiff had refused to comply with an order requiring the copying of documents. In the Second Circuit's view there had been "no true compliance with [the district court's] order at any time" (*id.* at 446)—not, as here, an alleged delay in compliance. Similarly, in *Perry v. Golub*, 74 F.R.D. 360 (N.D. Ala. 1976), the sanctioned party, *inter alia*, had made only very incomplete production, and in *Margoles v. Johns*, No. 76-1293 (7th Cir., Oct. 14, 1976), the trial court specifically found that the "failure to produce" had been "prejudicial" (*id.* at 3).

as the courts below recognized, would defeat the fundamental purpose of the Federal Rules 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1, Fed. R. Civ. P. For Rule 37 would be meaningless if an affluent party could defy discovery orders and misrepresent important facts, with the complete confidence that if it eventually 'complied' it could buy its immunity from Rule 37 sanctions by, at most, paying its opponent's attorney's fees." (Ohio's Brief, pp. 13-14).*

But it is not Andersen's position that a party guilty of "bad faith" is or should be free from *any* court-imposed sanction on the theory that its ultimate compliance makes sanctions imposed under Rule 37 improper. Such "bad faith" can be (and properly must be) sanctioned by exercise of the court's contempt powers. If what the trial court really intends to punish a party for is interfering with the "integrity" of a lawsuit the proper vehicle is a contempt proceeding, not a purported imposition of "discovery" sanctions under Rule 37; indeed, the very purposes cited by the district court (and by Ohio now) as having been served by the imposition of the "discovery" sanctions, *i.e.*, the preservation of the court's "integrity" and the "deterrence" of other parties to other cases, are the *precise* purposes which the criminal contempt proceeding is deemed to serve:

> "The object of a criminal contempt proceeding is to vindicate the authority of the court and to deter similar derelictions." (3 Wright, *Federal Practice and Procedure: Criminal*, §702 (1969)).

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*Ohio's invocation of the policy statement contained in Rule 1, F. R. Civ. P., is ironic. At the heart of Andersen's position that the novel principles relied on by the lower courts to justify the imposition of sanctions here are wrong, is the contention that those principles are not "just", and do not permit the "just determination" of a case, within the meaning of Rule 1.

Furthermore, if the trial court employs the contempt mechanism, the accused party is afforded procedural safeguards required in that type of a proceeding, *e.g.*, being informed of what the charges against it are, having an opportunity to produce witnesses and cross-examine witnesses called to testify concerning its alleged "bad faith", and the type of unfairness visited upon Andersen here would not occur.

CONCLUSION

For the reasons set forth above and in Andersen's Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit, the Petition should be granted.

Respectfully submitted,

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